IN THE SUPREME COURT OF THE UNITED STATES

JULIUS ROSENBERG AND ETHEL ROSENBERG

v.

UNITED STATES OF AMERICA.

APPLICATION TO CONVENE COURT IN SPECIAL TERM AND TO REVIEW STAY OF EXECUTION GRANTED BY MR. JUSTICE DOUGLAS OR TO RECONSIDER AND REACTIVATE THIS COURT'S ORDER OF JUNE 15, DENYING A STAY.

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UNITED STATES OF AMERICA.

APPLICATION TO CONVENE COURT IN SPECIAL TERM AND TO REVIEW STAY OF EXECUTION GRANTED BY MR. JUSTICE DOUGLAS OR TO RECONSIDER AND REAFFIRM THIS COURT'S ORDER OF JUNE 15, DENYING A STAY.

The Attorney General and the Acting Solicitor General, on behalf of the United States, respectfully petition the Chief Justice and the Associate Justices of this Court to convene a special term to review an order entered by Mr. Justice Douglas on June 17, 1953, staying execution of the sentences of death imposed upon the defendants, or to reconsider and reaffirm this Court's order of June 15, denying a stay.

The indictment against the defendants and others was returned on January 31, 1951. The defendants were sentenced on April 5, 1951. The convictions were affirmed, and a petition for rehearing was denied by the Court of Appeals. 195 F. 2d 583 (C.A. 2). A petition for certiorari was denied by this Court on October 13, 1952, 344 U.S. 838, and a petition for rehearing was denied on November 17, 1952, 344 U.S. 889, Nos. 111-112, O. T., 1952.

After the exhaustion of these direct review proceedings, the defendants instituted five further proceedings challenging their convictions and the sentences imposed upon them.

The first of these proceedings, which was instituted in the District Court on November 24, 1952, a few days after the denial of rehearing in Nos. 111 and 112, supra, was terminated with the denial of certiorari in No. 687, O.T., 1952, on May 25, 1953, and the denial of rehearing on June 15, 1953. On January 2, 1953, the District Court denied the defendants' motion for a reduction of their sentence. 109 F. Supp. 108. On May 26, 1953, the defendants filed in the Court of Appeals a motion for leave to file a petition for a writ of mandamus to the District Court. This proceeding attacked the District Court's refusal to reduce the sentences. The Court of Appeals denied the motion without opinion on June 2, 1953. On May 27, 1953, two days after this Court denied certiorari in No. 687, supra, the defendants filed a second motion under 28 U.S.C. 2255 in the District Court. That motion was denied on June 1 and the order of denial was affirmed by the Court of Appeals on June 5. On June 6, the defendants filed their third motion in the District Court based upon Section 2255 and Rule 33 of the Rules of Criminal Procedure. That motion was heard and denied on June 8, an appeal was taken on June 9, and the Court of Appeals affirmed on June 11, 1953.

On June 15, 1953 this Court denied an application for a stay of execution pending the determination of the petition for rehearing in No. 687 and the filing and determination of petitions for certiorari to review the Court of Appeals' judgments in the second and third proceedings mentioned above to set aside their convictions and in the mandamus proceeding.

On the same day, June 15, this Court denied the defendants' motion for leave to file a petition for an original writ of habeas corpus. No. 1 Misc., June 1953 Special Term.

Although the defendants raised numerous contentions in these proceedings, they have never raised the point which was the basis of Mr. Justice Douglas' stay order. In fact, they do not seem yet to have made it. The contention was first made in an application for a writ of habeas corpus by one Irwin Edelman, purportedly on the behalf of the defendants, in the District Court on June 13, 1953. The defendants' counsel specifically declined to consent to the filing of that petition. The petition was denied by the District Court on June 15, 1953, on the ground that Edelman had no standing to institute such a proceeding. An identical application, coupled with a prayer for a stay, was made to Mr. Justice Douglas on June 16 by counsel for Edelman, and, as we understand Mr. Justice Douglas' opinion and order of June 17, the stay of execution was based upon that application.

THE COURT HAS POWER TO, AND SHOULD, REVIEW AND VACATE THE STAY GRANTED BY MR. JUSTICE DOUGLAS

The full Court, as the highest judicial tribunal in the Nation, has power to vacate the stay granted by Mr. Justice Douglas. Since the only justification for a stay order by a single justice, under 28 U.S.C. 2101, is to preserve the appellate jurisdiction of the Court, the full Court can review the grounds of the stay and determine for itself that there is no such need to maintain the status quo. For it is the Court, and not its individual members, which is vested with appellate jurisdiction over proceedings in the lower courts. And it is therefore the Court which has the ultimate responsibility for overseeing the actions, by lower courts or judges or by a single justice, taken in the belief that this Court's jurisdiction needs protection. To hold that such interim actions of lower courts and judges, or of a single justice, are unreviewable is to overlook the essential basis for such stay orders as auxiliary to the effective functioning of the full Court.

The framework of the Constitution and the statutes make it clear that the Court has, and must have, this power of review. Article III endows the Court, and not the individual members, with judicial power in federal cases. The Judicial Code (28 U.S.C. 1254) gives the Court ultimate appellate jurisdiction over federal criminal convictions. Carrying out the conception that it is the Court as a whole which is the appellate tribunal, Section 2106 of Title 28 vests the Court with full authority to affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review--including, of course, the order of the

District Court or of the Court of Appeals which would be entered in the proceedings contemplated by Mr. Justice Douglas' order. The All-Writs Statute (28 U.S.C. 1651) gives the Court plenary power to issue all writs necessary or appropriate in aid of its jurisdiction. And it is plain from the terms of 28 U.S.C. 2101(e), under which a single justice can grant a stay, that this power is given solely to protect, in so far as necessary, the Court's appellate jurisdiction.

In view of this dependent relationship between the stay powers of a single justice and the jurisdiction of the Court, we suggest that the Court's power to review and revise the stay order stems directly from its position as the highest appellate tribunal in the federal system and need not rest on a specific statutory provision. But, in any case, Congress has expressly given the Court the broadest of means, in 28 U.S.C. 2106 and 28 U.S.C. 1651 (the All-Writs Statute), by which to take the necessary action. Under the latter provision, there is open to the Court a simple order vacating the stay, or, if deemed appropriate, the common-law writ of certiorari to review Mr. Justice Douglas' order, or, possibly, a writ of prohibition or mandamus. These and comparable common-law remedies are regularly used in cases, like this one, of great public importance where the ordinary processes of appeal are inadequate and where the circumstances imperatively demand immediate interposition by this Court. In re Chetwood, 165 U.S. 443, 462; Ex parte United States, 287 U.S. 241, 248-9; Ex parte Peru, 318 U.S. 578; U.S. Alkali Assn. v. United States, 325 U.S. 196, 201-4.

We know of no case in which this Court, or a court of appeals, has refused to entertain an application to review and

vacate a stay granted by a single justice or judge. In this Court, there are at least three recent instances in which such applications have been made and apparently considered on their merits by the full Court. In Fahey v. Mallonee, O. T. 1946, No. 687, Mr. Justice Rutledge granted a stay; a motion to vacate the stay was then presented to him, referred by him to the Court, and denied by the Court. Sup. Ct. Journal, O.T. 1946, p. 96 (Dec. 9, 1946). In Johnson v. Stevenson, 335 U.S. 801, and Land v. Dollar, 341 U.S. 737, 738, motions to vacate stays granted by single justices were also denied. In Alexander v. United States, 173 F. 2d 865 (C.A. 9), the Ninth Circuit, sitting en banc, vacated a stay granted by a single judge (on the ground that he had no power to make such an order).

IN THE ALTERNATIVE, THE COURT SHOULD RECONSIDER ITS ORDER OF JUNE 15 DENYING A STAY IN THE LIGHT OF THE NEW GROUND ON WHICH MR. JUSTICE DOUGLAS ACTED

On June 15, the full Court considered and denied the Rosenbergs' application for a stay of execution. If the ground upon which Mr. Justice Douglas granted the stay in his order of this date had been before the full Court when it acted, he would have considered himself bound by that action and would have denied the stay. It was only because the contention as to the applicability of the Atomic Energy Act had not been presented to the full Court that Mr. Justice Douglas, as he stated, felt free to consider it. In order, therefore, that the full Court may now have an opportunity to consider and pass upon the merits of the new ground upon which Mr. Justice Douglas' order was based, the Government respectfully requests the Court to vacate its order of June 15, for the purpose of considering whether the contention as to the applicability of the Atomic Energy Act affords sufficient basis for the granting of a stay; and if the full Court should conclude that it does not, it should thereupon enter an order denying a stay. In view of the express terms of Mr. Justice

Douglas' opinion accompanying his order, it is clear that such action by the Court would remove the basis upon which he acted, namely, that the ground presented had not theretofore been considered and decided by the full Court.

The opinion of the District Court rests on the substantiality of the argument that the death sentence cannot be imposed upon the Rosenbergs without compliance with Section 10(b)(2) of the Atomic Energy Act of August 1, 1946 (42 U.S.C. §2010 (b)(2)). This could be true only if the Atomic Energy Act provision repealed pro tanto this provision of the Espionage Act involved here. We shall show that the Atomic Energy Act was not intended to embody any such repeal, that the statutory provisions are not inconsistent, and that, in any event, the Atomic Energy Act would be inapplicable to this case so that even acceptance of the principle of repeal pro tanto would not be decisive.

That the Atomic Energy Act was not intended to repeal other pertinent statutory provisions is set forth plainly in the last sentence of Section 10(b), the very subsection of the statute involved here. Section 10(b)(6) provides:

> This section shall not exclude the applicable provisions of any other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of this section.*/

The former counsel for the Senate Special Committee on Atomic Energy has stated that the phrase "applicable provisions of any other laws", while general, must be read as pointing particularly to the Espionage Act." Newman, Control of Information Relating to Atomic Energy, 56 Yale L. J. 769, 790. The history of the statute fully supports this view.

S. 1717 as originally introduced by Senator McMahon in the 79th Congress had a section entitled "Dissemination of Information", which contemplated that "basic scientific information" and "related technical

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*/ The second clause of Section 10(b)(6), providing that "no Government agency shall take any action under such other laws inconsistent with the provisions of this section", does not preclude prosecution under the Espionage Act in the case of atomic espionage. As the report of the Special Committee on Atomic Energy, S. Rep. 1211, 79th Cong., 2d Sess., points out, the function of this clause is to prohibit any other agency "from placing information in a restricted category under the authority of this or any other law once such information has been released from the category by official action of the Atomic Energy Commission."

information" would not be "within the meaning of the Espionage Act" and would circulate freely. Presumably other atomic energy information would fall within the coverage of the Espionage Act. The Atomic Energy Commission would, under this version, "adopt by regulation administrative interpretations of the Espionage Act" with the express approval of the President. S. 1717 was initially introduced on December 20, 1945. Four successive Committee Prints of this bill prepared by the Senate Special Committee on Atomic Energy reflecting amendments under consideration maintained this scheme of control of atomic energy information within the framework of the Espionage Act. Committee Print No. 5, dated April 11, 1946, included as Section 10, information control provisions substantially identical in this respect to Section 10 of the Atomic Energy Act as ultimately enacted, i.e., deleted reference to the Espionage Act as protecting atomic energy information and contained for the first time a concept of restricted data and special espionage provisions for the protection of restricted data. Section 10(a)(5) of this Committee Print contained the wholly new provision presently incorporated as Section 10(b)(6) set forth above. The fact that this new provision appeared in the bill simultaneously with the deletion of the reference to protection of atomic energy secrets under the Espionage Act and the creation of new espionage provisions applicable to restricted data must be interpreted as indicating Congressional intent that the Espionage Act remain applicable to atomic energy information. Senate Report No. 1211, 79th Congress, on S. 1717, discussing Section 10 of the Atomic Energy Act, indicates that this provision was drafted in an effort to reconcile the requirement for security control of information with the necessity for "sufficient freedom of interchange between scientists to assure the Nation of continued scientific progress." This statement in the Committee Report on which Justice Douglas bases his conclusion that one of the

purposes of the Atomic Energy Act was to ameliorate the penalties imposed for disclosing atomic secrets is somewhat clarified by Senator McMahon's statements during Senate debate on this bill.

On page 6082 of the Congressional Record of June 1, 1946, Senator McMahon referred to the security restraints written into Section 10 of S. 1717 and stated:

> "This was one of the most difficult subjects with which we had to deal, because we realized that if we were to progress, as we must progress in this science, the maximum amount of freedom had to be allowed scientists. At the same time, it was appreciated that during the pending state of the world's affairs it was absolutely necessary that we impose some restrictive clauses. We discovered that the Espionage Act as it was written would not do, so S. 1717 was written so as to strengthen the provisions of the Espionage Act and thus cover the subject. (Italics supplied)

It is apparent from this that S. 1717 was intended to strengthen the Espionage Act provisions -- e.g., by imposing the death penalty in peace time -- and not to repeal them. It is also apparent the Senate Committee was concerned not with the problem, as Mr. Justice Douglas suggests, of ameliorating the penalties for atomic espionage, but rather with providing scientists with "the maximum amount of freedom."

Senator McMahon inserted in the record of the Senate debate on S. 1717 a prepared statement summarizing the major provisions of the Atomic Energy Act. In speaking of the information control provisions, this statement indicated that the problem of providing for "freedom necessary for scientific research and development" was not a problem of degree of penalty, but rather was a problem of precisely what types of information should be protected at all for penal provisions. See 92 Cong. Rec. 6096. This view is also supported indirectly by the published Hearings on the atomic energy bill. No question was raised by any of the scientists as to the degree of penalty which was appropriate for atomic espionage. The scientists did, however, object to "penalties which can be applied in arbitrary and unusual ways." See testimony of Dr. Harold Urey before Special Senate Committee on November 29, 1945, p. 103.

It is also apparent that one of the provisions of the new penal provisions of the Atomic Energy Act was to increase the penalties applicable to espionage relating to restricted data rather than to ameliorate the penalties applicable to restricted data, since the penalties for violation of the Atomic Energy Act provisions were generally considerably more severe than the penalties which would apply to the same acts if prosecution were under the Espionage Act.

This conclusion from the legislative history that there was no intent to repeal the Espionage Act is buttressed by the well-established principle that repeals by implication are not favored and that "when there are two acts upon the same subject, the rule is to give effect to both if possible." United States v. Borden Co., 308 U.S. 188, 198; United States v. Gilliland, 312 U. S. 86, 93-96.

Plainly there is no inconsistency, even pro tanto, between the two statutes as here applied.

Under the Atomic Energy Act the death sentence may be imposed upon a recommendation of the jury if there is a finding of intent to injure the United States. This applies in peace as well as in war. Under the Espionage Act the death penalty may be imposed for espionage only in time of war. Thus an offense under the Espionage Act in time of war, irrespective of whether it refers to atomic energy or not, is punishable by death. Certainly it is entirely consistent to impose the death penalty (1) for atomic espionage at any time if one set of conditions is fulfilled and (2) for a conspiracy with respect to a combination of atomic and other espionage in wartime without fulfilling such conditions.

In this case there has been a specific holding by the Court of Appeals that the conspiracy charged and proved was broader than one merely to commit atomic espionage. As the Court of Appeals said in its original opinion in this case, 195 F. 2d 583, 601:

> "* * * here there was a single unified purpose: the 'common end' consisted of the transmission to the Soviet Union of any and all information relating to the national defense: * * * ."

That holding was one of the major issues raised in the petition for certiorari on direct review in this case. Since, therefore, it is clear that a conspiracy during wartime to commit espionage as to matters other than atomic energy could be governed only by the Espionage Act, and since it is also clear that this conspiracy did in fact cover matters other than atomic energy, prosecution and penalty under the terms of the Espionage Act were clearly justified.

In any event, none of the acts alleged and proved in this case would have violated the Atomic Energy Act since the transactions relating to atomic energy occurred before the passage of that Act in 1946 and the subsequent events did not relate to atomic energy. Thus, it is clear that under the facts of this case the indictment could be maintained only under the espionage statute. As noted in the opinion of Mr. Justice Douglas, the conspiracy commenced on or about June 6, 1944 - more than two years prior to the effective date of the Atomic Energy Act. All of the overt acts alleged in the indictment, and on the basis of which the jury returned its verdict, occurred between June 1944 and January 1945.

The trial testimony concerning atomic energy information which was transmitted to the Soviet Union pursuant to the conspiracy was given by David Greenglass, Ruth Greenglass and Harry Gold. All such information was furnished to the conspirators by David Greenglass. According to the testimony, the last information relating to atomic energy which Greenglass furnished to the Rosenbergs was given in September 1945 -- still almost a year prior to the effective date of the Atomic Energy Act. It is to be noted that Greenglass severed his connection with the Los Alamos Atomic Bomb Project in February 1946, when he was discharged from the Army. Thus the trial record contains no evidence of atomic energy information furnished to the conspirators subsequent to the effective date of the Atomic Energy Act.

The evidence summarized in footnote 3, page 7 of the opinion of Mr. Justice Douglas as to acts occurring after 1946 relates solely to non-atomic energy subjects. Indeed one of Sobell's main arguments in his petition for certiorari was that he was not connected with the atomic energy phase of the conspiracy.

Under these circumstances, it seems clear that the provisions of the Atomic Energy Act would not be applicable to the facts of this case. Not only was the conspiracy a general one dealing in any and all information relating to the national defense -- and not restricted to atomic energy information -- but also the acts of transmission of atomic energy information occurred prior to the passage of the Atomic Energy Act.

CONCLUSION

It is important in the interests of the administration of criminal justice and in the national interests that this case be brought to a final determination as expeditiously as possible. "Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the court of conviction, are objectives of criminal law." United States v. Johnson, 327 U.S. 106, 112. It has been more than two years since the date of defendants' convictions and sentencing. As pointed out above, their convictions were carefully reviewed and affirmed by the Court of Appeals and this Court declined to review its judgment. Meanwhile, the defendants have exhausted the privileges the law allows for re-examination of the validity of their convictions. Having invoked those privileges and their own claims having been found to be without merit, we urge that it would not be in the interests of orderly processes of justice that the point of law upon which Mr. Justice Douglas based his stay order wend its way through the District Court and then to the Court of Appeals and this Court before this case can be brought to a final conclusion. We believe that the paramount public interest in the prompt and effective administration of criminal justice requires that this Court hear and determine the matter as expeditiously as possible.

In requesting the Court to take this action, the Government is fully mindful that human lives are at stake, and that in no circumstances should the extreme penalty of the law be exacted until the fullest measure of justice and due process of law has been afforded. The Government is not asking that the Court act with unseemly haste to avoid postponement of a scheduled execution.

On the contrary, we are convinced that the only conclusion which fair-minded persons could draw from the history of this case is that, after a fair trial in which guilt was clearly established, and after successive appeals to this Court and the Court of Appeals--in which they had every opportunity to present every contention of law and fact to support their position--proved without avail, the defendants have now received the fullest measure of justice and due process of law. Further postponement would not serve the interests of justice. Respect for the orderly processes of law cannot help but be impaired by a parade of repeated unmeritorious appeals, each new one presenting only an insubstantial variation from its predecessors.

HERBERT BROWNELL, JR.
Attorney General.

ROBERT L. STERN,
Acting Solicitor General.

JUNE 1953.

File No.

SUPREME COURT, U. S.

~~*October Term, 19 53.*~~

Term No.

Rosenberg, et al.,

~~Petitioners,~~

vs.

United States

Application to convene Court in Special Term and to review stay of execution of Douglas, J. or to reconsider and reaffirm Court's order of 6/15, denying stay.

Filed June 17, 19 53.

U. S. GOVERNMENT PRINTING OFFICE 16—17377-3

June 18, 1953

IN THE SUPREME COURT OF THE UNITED STATES

JULIUS ROSENBERG AND ETHEL ROSENBERG

v.

UNITED STATES OF AMERICA

I

The stay granted by Mr. Justice Douglas should be permitted to stand to enable the Court to consider the problem of law stated by him.

In those cases in which the Court has considered stays ordered by single justices, it has permitted them to stand. The reasons for doing so are well stated in Land v. Dollar, 341 U.S. 737. These reasons apply to the question raised in the present proceeding.

II

The questions raised by Mr. Justice Douglas about the application of the ATOMIC ENERGY ACT to the alleged crime of the Rosenbergs are substantial, and merit deliberate consideration.

As Mr. Justice Douglas points out, the Atomic Energy Act, plainly applicable to crimes committed after its enactment, may well apply to the conspiracy allegedly proved and explicitly relied on in this case. As Mr. Justice Douglas points out, many of the alleged events in the supposed conspiracy occurred after the enactment of the Atomic Energy Act. In justifying his sentence, the Judge has depended on the circumstance that the Government introduced evidence purporting to show the "single conspiracy" extended beyond the period of our alliance with Russia and well into the period of the "cold war." The Government cannot have it both ways. If this alleged conspiracy was a single one it extended beyond the enactment of the Atomic Energy Act, and may well be governed by its provisions.

The Government's effort to reconcile the Espionage Act with the Atomic Energy Act on page 11 of its memorandum does not face the problem.

The application of each to acts committed in time of peace raises no difficulty. It is easy to understand why other kinds of espionage in time of peace are to be punished less severely than atomic espionage. The difficulty is to understand why they are to be punished more severely in time of war.

These are examples of the difficulties in the interpretation and application of the Atomic Energy Act felt by Mr. Justice Douglas.

III

The deliberate consideration of the questions raised here would not unduly prolong this case.

United States v. Johnson, 327 U. S. 106, was an income tax violation case in which after the final decision of this Court a motion for a new trial was before the courts, including this Court, for two years and three months.

Where a single justice finds himself troubled by a substantial question in a case which has lasted no longer than the present one, it would seem consistent with the traditions of this Court to permit his stay to stand. This is particularly so in a case where the two persons accused, under strong temptation to make a false confession, have steadfastly refused to concede that they have anything to confess; where new evidence has raised serious questions about both the verdict and the trial; and where the execution of the judgment will mean not only death but some disgrace for the accused and those related to them. It is hard to see how time for due consideration will prejudice the Government. In the circumstances, further time to consider the difficulties felt by Mr. Justice Douglas seems required by those standards of deliberation which are essential in the administration of justice.

[redacted]
Attorney for Petitioners

File No.

SUPREME COURT. U. S.

SPECIAL TERM, June 18 and
~~October Term, 19~~ 19, 1953

Term No. -----

Rosenberg, Julius et al.,

Petitioners,

vs.

United States

Memorandum in opposition to motion to vacate stay.

Filed June 18, 1953.

U. S. GOVERNMENT PRINTING OFFICE 16 17577

~~IN THE UNITED STATES COURT OF APPEALS~~

~~FOR THE SECOND CIRCUIT~~

United States of America, On the Relation of Irwin Edelman,

Petitioner

vs.

William A. Carroll, United States Marshall for the Southern District of New York, and Wilfred L. Denno, Warden of Sing Sing Prison of the State of New York, Ossining, New York

Respondents

PETITION FOR THE WRIT OF HABEAS CORPUS

To HONORABLE ~~THOMAS J. SWAN~~ William O. Douglas, Justice of the United States Supreme Court
~~JUDGE OF SAID COURT:~~

Petitioner, Irwin Edelman, a citizen of the United States and a resident of the City of Los Angeles, State of California, files this petition as the next friend of Julius and Ethel Rosenberg and states:

I.

The said Julius and Ethel Rosenberg, both citizens of the United States and residents of the State of New York, are detained by the Respondents, named ~~in the caption~~ in Sing Sing Prison of the State of New York at Ossining within the jurisdiction of the Southern District of New York, under an order of commitment of the District Court for the Southern District of New York awaiting execution by electrocution. The facts regarding their detention are:

On January 31, 1951, the Grand Jury of the United States for the Southern District of New York returned an indictment against the said Julius and Ethel Rosenberg, Morton Sobell, Anatoli A. Yakovlev, and David Greenglass, charging:

"1. On or about June 6, 1944, up to and including June 16, 1950, at the Southern District of New York, and elsewhere, Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as 'John', David Greenglass and Morton Sobell, the defendents herein, did, the United States of America then and there being at war, conspire, combine, confederate and agree with each other and with Harry Gold and Ruth Greenglass, named as co-conspirators but not as defendants, and with divers others presently to the Grand Jury unknown, to violate sub-section (a) of Section 32, Title 50, United States Code, in that they did conspire, combine, confederate and agree, with intent and reason to believe that it would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the National Defense of the United States of America."

Overt Acts

(Statement of Overt Acts Omitted).

(Section 34, Title 50, United States Code.)"

The said Julius and Ethel Rosenberg (hereinafter referred to sometimes as defendants) plead not guilty to the indictment and were put to trial before a jury on March 6, 1951. On March 29, 1951, the jury returned a verdict finding defendants "guilty as charged." On April 5, 1951, the court entered judgment and commitment as follows:

"On this 5th day of April, 1951 came the attorney for the government and the defendant appeared in person and by counsel,

"It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy, with intent and reason to believe that it would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the National Defense of the United States, while the United States of America was then and there at war. Title 50 Section 34, United States Code as charged. And the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

"It is adjudged that the defendant is guilty as charged and convicted.

"It is Ordered and Adjudged thatthe said defendant, Julius Rosenberg, for the crime by him commited and upon the verdict of the jury in this court, during the week commencing May 21, 1951 be by the United States Marshall for the Southern District of New York executed until dead and the said punishment of death shall be inflicted in the manner and form as

provided by the statutes of the United States of America, and in conformity and in compliance with the manner described by the laws of the State of New York.

"It is Ordered and Adjudged that the defendant, Julius Rosenberg, be and he is hereby committed to the custody of the Attorney General or his authorized representative for appropriate detention pending execution of the sentence by the United States Marshall in accordance with the provisions of Section 3566, Title 18, United States Code.

"It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

Irving R. Kaufman, United States District Judge"

(The judgment with respect to Ethel Rosenberg is in identical words.)

The said judgment was appealed and further proceedings have been taken resulting in the entry of an order by the District Court for the Southern District of New York, directing that the sentence of death by electrocution against Julius and Ethel Rosenberg be executed during the week commencing June 15, 1953.

II

A ~~circuit judge~~ Supreme Court Justice has the power to grant the writ of habeas corpus under Sec. 2241, Title 28 U.S.C.

The right of petitioner to file this petition and thereby invoke the judicial power to correct the injustice and imminent danger of the defendants losing their lives without due process of law derives from the fact that they are in custody in solitary confinement in the penitentiary and are cut off from communication with the outside world except through their counsel who refuses to raise the adequate and available defenses to procure the release of the defendants, notwithstanding such defenses are known to him.

Petitioner is advised that in this case for the reasons to be hereinafter fully shown, the defendants have suffered the deprivation of effective assistance of counsel, contrary to the Sixth

Amendment and the denial of the protection of due process of law guaranteed to them by the Fifth Amendment. He avers that in such circumstances it is the duty of the Court to see that the constitutional rights of the defendants are fully protected.

III

Petitioner avers that the death sentence is void for the reasons that:

(a) It was based on an unauthorized finding by the court that "the Rosenbergs intended to and did transmit atomic information to the Soviet Union during time of war." (Statement from opinion of Hon. Irving R. Kaufman, District Judge, June 1, 1953).

The foregoing finding was unauthorized because the indictment did not charge the defendants with the actual transmission of any information. It charged them only with conspiring to transmit information, which was a separate and distinct offense from the one for which the court pronounced the sentence of death.

(b) Inasmuch as the conspiracy found by the Grand Jury in the indictment was alleged to have continued from June 6, 1944, up to and including June 16, 1950 and, therefore, was renewed after the Atomic Energy Act of 1946 went into effect, the defendants, for the conspiracy charged, in so far as the transmission of atomic information may have been an object were subject only to the penal provisions of the act and not the penal provisions of the Espionage Act.

Since the indictment did not charge that the defendants conspired with intent to injure the United States, they were not punishable by death because the Congress in enacting the Atomic Energy Act ameliorated the unprecise and harsh penal provisions of the Espionage Act in so far as they might otherwise be applicable to the transmission of atomic information or conspiring so to do, by

1. Depriving the courts of any authority to impose the death sentence for any offenses of the type under consideration here except upon the recommendation of the jury; and

2. Restricting the power of the jury to recommend punishment by death or imprisonment for life to cases where the office was committed with intent to injure the United States.

The indictment in the case at bar did not charge the defendants with conspiring with intent to injure the United States.

IV

Petitioner further avers that the defendants were denied a fair trial by the impounding of Government's Exhibit 8 and the accompanying explanatory notes and the exclusion of the public from the court room on the motion of counsel for the defendants Julius and Ethel Rosenberg stated in the presence of the jury in the following words:

"Mr. E. H. Bloch: I was willing to do this, your Honor - I want to restate it very clearly. I thought that in the interest of National Security, any testimony that this witness may give of a descriptive nature concerning the last Government exhibit might reveal matters which could not be revealed to the public.

The Court: Therefore?

Mr. E. H. Bloch: And, therefore, I felt that this testimony on this aspect should be revealed solely to the Court, to the jury and to counsel and not to the public generally."

The prejudice to the defendants from the order of the court directing that the exhibits be impounded and the testimony of the witness David Greenglass concerning same be given after the exclusion of the public from the courtroom is conclusively demonstrated by the following instruction by the court to the jury:

"I charge you that the information which the defendants are accused of conspiring to obtain, must be secret information relating to the national defense, that is, information which was not public at the time of the alleged conspiracy."

The Supreme Court in the case of Gorin vs. United States, 312 U. S. 19, in construing Sec. 32 of the Espionage Act, held

that it was saved from unconstitutionality on the ground of vagueness, generality and indefiniteness solely by reason of the fact that the question of "whether the information relates to the national defense is one for the determination of the jury as an issue of fact, saying:

"The question of the connection of the information with National Defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined".

Here, the province of the jury was invaded by the improper admission by counsel (before the evidence was heard and notwithstanding he had no knowledge of the contents of the exhibit and notes nor what testimony the witness could be) that it "might reveal matters which could not be revealed to the public".

This admission, in the light of the court's instruction quoted above necessarily had the effect of replacing the presumption of innocence to which the defendants were entitled throughout the trial, and even while the evidence was being weighed by the jury, with a conclusive presumption of guilt in so far as this essential element of the offense was concerned.

The defendants are about to be deprived of their lives through the denial of their constitutional rights to be confronted with the witnesses against them in a public trial and to have every issue of fact determined by the jury. The court and defense counsel had no right to determine against the defendants in the manner they did, that the testimony the witness Greenglass was about to give, and the information he was going to claim was transmitted to Julius Rosenberg was such that it could not be revealed to the public without adversely affecting the national

interest and security.[1] Due process of law required that this question be determined by the jury, and so far as appears from the record the defendants have made no intelligent and understanding waiver of their constitutional rights to have this issue submitted for the determination of the jury.

---

1. The exhibits and notes due to the impounding are not subject to inspection by experts who could assist the defendants by showing the real character of the information which Greenglass claimed to have collected and delivered to Julius Rosenberg. That inferences contrary to those drawn by the Court and defense counsel (before either had any basis for an informed judgment as to the real character of the exhibit, notes and "information" which were introduced in evidence by the Government through David Greenglass, a mere machinist, could be drawn by intelligent men is evidenced by:

(a) The 222-page report published immediately after the trial by the Joint Committee on Atomic Energy entitled SOVIET ATOMIC ESPIONAGE (Government Printing Office; 1951) apparently with the collaboration of the Federal Bureau of Investigation, the Department of Justice, and the Atomic Energy Commission concluding that the information David Greenglass claimed to have passed on to Julius Rosenberg was relatively unimportant.

(b) The summary and comment on the "secret" testimony of David Greenglass published by SCIENTIFIC AMERICAN in its issue for May 1951 as follows:

> "To naive newspaper readers who have gained the impression that the secret of the atomic bomb is a neat little blueprint that any mechanic could steal or even reconstruct in his basement, this performance must have seemed curious indeed. What the newspapers failed to note was that without quantitative data and other necessary accompanying technical information the Greenglass bomb was not much of a secret. The principle of 'implosion' by means of a shaped charge has often been suggested in speculation on a possible mechanism for detonation of the atomic bomb.
>
> "The relative unimportance of Greenglass' disclosure was confirmed after the trial by the Joint Congressional Committee on Atomic Energy in a report on Soviet atomic espionage. The Committee said that by far the most damaging spy was Klaus Fuchs, the German-born British physicist who had access to and understood all phases of the atomic bomb program. Greenglass' diagrams, said the Committee, 'have a theatrical quality and at first glance may seem the most damaging single act committed by any of the main betrayers.' But because he was not a scientist 'the bomb sketches and explanations that Greenglass could prepare must have counted for little compared with the quantitative data and the authoritative scientic commentary upon atomic weapons that Fuchs transmitted.' There was evidence, said the Committee, that after Soviet agents had learned what kind of information 'Greenglass was capable of telling them, they lost some of their interest in him as an informant.

1 (continued)

"Greenglass was sentenced by Judge Kaufman to 15 years in prison, Sobell to 30 years, Julius and Ethel Rosenberg to death--the first U.S. spies ever to receive the death penalty."

(c) The critical appraisal of Greenglass' testimony from what purports to be an informed scientific viewpoint by LIFE magazine, a popular magazine claiming a circulation over 5,200,000, for March 26, 1951 (Vol. 30, No. 13, pp.51-52) concluding as follows:

"At first glance Greenglass's implosion bomb appears illogical, if not downright unworkable. There seem to be two things wrong with it. 1) It contains only one mass of plutonium and 2) it contains an apparently useless neutron source."

Aside from the unconstitutional deprivation of the rights of the two defendants, the wholly novel procedure adopted in this case with respect to the "impounding" of the "atom bomb secret" tends to bring disrespect upon the courts. The secret testimony that was patriotically guarded from the eyes and ears of the general public was available in lengthy and detailed reports in the daily press the next morning. For example, the New York Times for March 13, 1951, copy attached. The Times' summary of the testimony of David Greenglass was quoted in Soviet Atomic Espionage by the Joint Committee on Atomic Energy which, although it had a representative present in the court room during the giving of the testimony by Greenglass, was unable to use the official reporters' transcript due to the impounding order and therefore printed the version of the newspaper reporter who was permitted to be present in the court room and hear the testimony with no restrictions on the freedom of publication, except the dictates of "good taste".

Also the general dissemination by the press of the "secret testimony" of David Greenglass with his amazing "sketch" of the atom bomb itself with the accompanying 12 pages of explanatory notes he produced from memory more than five years after theoriginal "transmission" of the "secret" to Rosenberg in September 1945, according to his smiling testimony as related by the New York Times puts the Atomic Energy Commission in a rather embarrassing if not culpable position. Mr. Saypol, the prosecuting attorney had stated in open court as follows:

"Mr. Saypol: Will your Honor allow a statement for the record in that respect? The Atomic Energy Committee has declassified this information under the Atomic Energy Act and has made the ruling as authorized by Congress that subsequent to the trial it is to be reclassified.

1. (continued)

"The Court: Counsel doesn't take issue with that statement.

Mr. E. H. Bloch: No, not at all. I read about it in the newspapers before Mr. Saypol stated it."

TR. pp. 478-479

Nothing, of course, contained in the Atomic Energy Act or any other act constituted authority from the Congress to the Atomic Energy Commission to "declassify" information solely for the purpose of a trial. And the process by which data that was restricted because it could not be released without adversely affecting the national security (the standard prescribed by Congress in Sec. 10 of the Atomic Energy Act) could be declassified and after having been revealed in a public court trial at which the press could not be lawfully and constitutionally excluded or barred from publication, and pored over by the millions of avid readers of the New York Times, Life magazine, etc., and then "reclassified" is a far deeper secret than an "implosion."

The above considerations suggest, it seems to the writer of this petition, that the protection of the dignity of and respect for the court and the question of the maintenance of our honored tradition for deliberative justice against all forms of outside prejudices, clamor, and hysteria, should be a matter of serious, immediate concern, along with the lives of Julius and Ethel Rosenberg.

The defendants were denied a fair trial and their right under the Sixth Amendment to be informed of the nature and cause of the accusation against them for the reasons that

(a) Under the cloak of the generality of the indictment charging a conspiracy to violate Sec. 32(a) of the Espionage Act (Sec. 794(a) of Title 18 U.S.C) in the generic terms of the statute without stating any particulars, evidence was introduced and submitted to the jury which tended to prove that the object of the alleged conspiracy was various other related, but separate and distinct, offenses, none of which was punishable by penalties as severe as that prescribed by Sec. 32 (a), viz:

1. Sec. 31 of the Espionage Act (Sec. 793 of Title 18 U. S. C.) making it an offense to <u>obtain</u> information relating to the national defense for purposes within the prohibitions stated in Sec. 32, the punishment being a fine of not more than $10,000, or imprisonment for not more than two years or both, and irrespective of whether the offense be committed in timeof war or in time of peace.

The prejudice to the defendants resulting from the confusion of offenses arising under the separate sections, 31 and 32 of the Espionage Act, is shown by the fact that the only direct testimony tending to prove the element of conspiring, confederating, combining and agreeing by Julius and Ethel Rosenberg was that of David and Ruth Greenglass which tended to show the commission by Julius Rosenberg of an offense under Sec. 31 of Title 50 U. S. C., rather than a conspiracy to violate Sec. 32. To demonstrate this assertion the pertinent clauses of Sec. 31 and the testimony of Ruth Greenglass are set out in parallel columns below:

"Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any ... factory...building, office, or other place connected with the national defense, owned or constructed, or in progressof construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any ... arms, munitions, or other materials or instruments for use in time of war are being prepared, ... under any contract or agreement with the United States, or with any person on behalf of section 36 of this title; or whoever for the purpose aforesaid, and with like intent or reason to believe, copies, ...

"The Witness: Yes.

Q. (Continued) And he said - I wanted to know how he knew what David was doing. He said that his friends had told him that David was working on the atomic bomb, and he went on to tell me that the atomic bomb was the most destructive weapon used so far, that it had dangerous radiation effects, that the United States and Britain were working on this project jointly and that he felt that the information should be shared with Russia, who was our ally at [fol. 974] the time, because if all nations had the information then one nation couldn't use the bomb as a threat against another. He said that he wanted to tell my husband David that he should give information to Julius to be passed on to the Russians. And at first I objected to this. I didn't think it was right. I said that the people who are in charge of the work on the bomb were in a better position to know whether the information should be shared or not.

Ethel Rosenberg said that I should at least tell it to David, that she felt that this was right for David, that he would want it, that I should give him the message and let him decide for himself, and by the -- Julius and Ethel persuaded meto give my husband the message and they told me the information -

Mr. E. H. Bloch: I move to strike it out.

Sec. 31 (Continued)

takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch ... document, writing, or note of anything connected with the national defense; or whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, sketch, note, or anything connected with the national defense, knowing or having reason to believe at the time he receivesor obtains, or agrees or attempts or induces or aids another to receiveor obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title;.... shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years or both."

Testimony of Ruth Greenglass (Continued)

The Court: All right, strike out the word 'persuaded'.

As a result of this conversation you decided to give your husband-

The Witness: I decided to give my husband the message, and Julius Rosenberg told me the things that he wanted me to ask my husband, the information that he wanted me to bring back.

[fol. 975]. Q. And what information did he ask you to obtain from your husband if he should be willing to do it?

A. He wanted a physical description of the project at Los Alamos, the approximate number of people employed, the names of some of the scientists who were working there-something about whether the place was camouflaged, what the security measures were and the relative distance of the project to Albuquerque and Santa Fe. Oh-and he told me-I am sorry-he told me also to tell David to be very circumspect not to indulge in any political conversations and to be very careful not to take any papers or sketches or blueprints, not to be obvious in seeking information, to relate to me only what he retained in his memory.

Q. And did you during the course of that conversation agree to relay this message, or did you tell the Rosenbergs whether you would relay the message to your husband?

A. I did."

The Court of Appeals with respect to the testimony of the Greenglasses said:

"Doubtless, if that testimony were disregarded, the conviction could not stand."

The overt acts set forth in the indictment are consistent with the commission of an offense under Sec. 31. It is stated that Julius Rosenberg received from Ruth Greenglass "a paper containing written information" (Overt Act 6) and that he received from David Greenglass "a paper containing sketches of experiments conducted at the Los Alamos Project" (Overt Act 11).

No overt act indicates any agreement for the transmission of the information and papers received by Julius Rosenberg.

That the testimony of the Greenglasses tended more to support the commission of the offense of inducing another to make or obtain a sketch, document, writing or information connected with the national defenseor receiving or obtaining from some other person or source a document, writing, sketch or information connected with the national defense (which is prohibited by Sec. 31) than a conspiracy, combination, confederation or agreement to transmit documents, writings, sketches, notes or information relating to the national defense is shown by the assumption implicit in Court of Appeals' summary of the government's evidence that the information was sought to be obtained by Julius Rosenberg only for "ultimate transmittal to the Soviet Union."

Furthermore, the Court in instructing the jury so confused the offense of conspiracy to transmit information with the offense of conspiring to obtain information, placing such repeated and heavy emphasis on the latter that it is highly probable that the jury intended to find the defendants guilty of the latter rather than the former.

The confusing, misleading and prejudicial instructions given to the jury by the court are shown in parallel columns below:

Conspiring to transmit

"...the indictment in effect charges conspiracy or agreement ... to deliver.....information .." (Tr. 1553)

"The charge is that of conspiring to transmit information relating to the national defense..." (p.1553).

"I charge you further that the information which it was the object of the alleged conspiracy to transmit must have related to the national defense." (p.1554)

"So you must find whether a conspiracy did exist and whether this conspiracy called for
(1) the transmitting of secret information... (p.1554)

"The prosecution claims that the defendants on trial conspired... to communicate deliver and transmit... documents and information relating to the national defense...(p.1554)

"It is the prosecution's contention that Sobell was part of the conspiracy to transmit secret information to Russia... (p.1555)

Conspiring to obtain

"I charge you that the information, which the defendants are accused of conspiring to obtain, must be secret information, relating to the national defense."(p.1554)

"Furthermore the statute requires that the alleged conspirators have intended or have reason to believe that the information to be obtained was to be used to the advantage of a foreign nation." (p.1554)

"The prosecution further contends that Julius and Ethel Rosenberg, David and Ruth Greenglass, Morton Sobell and Harry Gold were part and parcel of this conspiracy to obtain banned information and to transmit it to Yakovlev, the Russian representative ..." (p. 1555)

"The prosecution further contends that Julius Rosenberg visited Elitcher's home in Washington,D.C. in June, 1944 and asked him to get classified information from the Navy Department ..." (p.1555)

"The prosecution further contends... that Rosenberg visited Elitcher in Washington in September, 1945 and said there was a continuing need for getting material for Russia." (p.1555)

Conspiring to transmit

(The prosecution further claims) "They further contend that secret information regarding the atom bomb project was transmitted by the Greenglasses to Julius Rosenberg; that the information was typed from written reports by Ethel Rosenberg, microfilmed by Julius Rosenberg and then transmitted to the Russians."
(p. 1557)

Conspiring to obtain

"The prosecution further contends that Sobell directly solicited Elitcher for classified information from the Navy Department, in particular a fire-control report..."(p.1555-6)

"The prosecution states further that...Sobell asked Elitcher if he knew any progressive electrical engineers for espionage purposes;".....(p.1556) that the three met and Julius Rosenberg attempted to persuade Elitcher to stay in Washington, Rosenberg stating that they needed somebody to work in the Navy Department--"
(p.1556)

"The prosecution further claims that it was also a part of this same conspiracy to obtain information regarding the atomic bomb project;...that Harry Gold as courier collected the information regarding the atomic bomb from various persons in this country,.. "
(p.1556)
(The prosecution further claims...) "that David and Ruth Greenglass were drawn into this conspiracy by Julius and Ethel Rosenberg's urgings and their request for information regarding the atom bomb."
(pp.1556-7)

"The Government attempted to show...that one-half of the Jello box-side was kept by Julius Rosenberg to be used as a recognition signal by the courier to be sent by Rosenberg to pick up secret information obtained by Greenglass at Los Alamos, and that Gold subsequently received the part of the box-side from Yakovlev and used it to obtain the information from Greenglass,...."
(p.1557)

Conspiring to transmit

(the Government contends)
"that the atomic bomb information transmitted by the Rosenbergs was classified as top secret;"
(p. 1557).

"....I have admitted testimony as to membership or activity in the Communist Party...solely on the question of the defendants' intentor reason to believe that the alleged secret information to be transmitted would be used to the advantage of a foreign nation,...."
(p.1558)

Conspiring to Obtain

"that based on Rosenberg's alleged statements to Greenglass, other secret information such as mathematical data on atomic energy for airplanes, information relating to a 'sky platform' project and other information was obtained by Julius Rosenberg from scientist contacts in the country."
(p. 1557)

"Again I want to emphasize that the conspiracy in this case is a conspiracy to obtain secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature."
(p. 1560)

"The defendants Julius and Ethel Rosenberg categorically deny that they or any of them ever conspired among themselves or with anyone else to obtain secret information pertaining to the national defense of the United States, intending to transmit the information to the Union of Soviet Socialist Republics, to the advantage of that nation."
(p.1560-1)

Twice towards the end of this charge the court instructed the jury that the defendants were charged with conspiring to obtain information. Throughout the charge a great deal more stress was placed on obtaining information than on transmitting information. But the conviction and sentence have been based on one of the offenses relating to transmission. The three separate and distinct offenses that have been confused at some stage of the case are:

The first (conspiring to violate Sec. 793, Title 18, U. S. C. by obtaining information) was punishable by a maximum of a $10,000 fine or imprisonment for not more than 2 years or both. The second (conspiring to violate Sec. 794(a) by transmitting information) was punishableby imprisonment for not more than 20 years, and the third, as the court since the verdict has ruled, (conspiring to transmit information in time of war so as to amount to an offense under Sec. 794(b), Title 18, U.S.C.), in which case the punishment could be death or imprisonment for not more than 30 years.

The meaning of fair trial cannot be stretched to sanction a procedure where a man on trial for murder is convicted by the jury on instructions from the court that the jury is authorized to find him "guilty as charged" if they find from the evidence that the defendant slapped another in the face with the palm of his hand. No more so can it justify the conviction of Julius and Ethel Rosenberg for conspiring to commit a capital offense by the submission to the jury of the question whether a ten year maximum prison term offense was committed.

In view of the confusion that existed in the mind of the court, as regards the two offenses, it is difficult to believe that the Court's instructions did not confuse the jury also. It is not necessary to prove that the jury intended to find only that defendants conspired to obtain

information relating to the national defense. It is enough to render the verdict unsupportable that the instructions would naturally and inevitably tend to confuse the jury and there can be no certainty that the jury intended to find that the defendants conspired to transmit information instead of conspiring merely to obtain information.

This case is, therefore, a very forceful illustration of the reason for the constitutional requirement that the defendant be informed of the nature and cause of the accusation against him to prevent double jeopardy and to enable the court to determine from the facts charged their sufficiency in law to support a conviction if one be had.

2. Sec. 10 (b)(2)(A) and (B) and Sec. 10 (b) 3 of the Atomic Energy Act of 1946 (Title 42 U.S.C. Sec. 1810) declaring it to be an offense not only to communicate, transmit or discloseto any individual or person "information involving or incorporating restricted data" and also an offense for anyone to attempt or conspire to do any of the foregoing.

The allegations of the indictment following the generic words of the Espionage Act (Secs. 31 and 32) were substantially identical with the language of Sec. 10 of the Atomic Energy Act and but for the specific statutory references, were as appropriate to charge an offense under the Atomic Energy Act asthe Espionage Act. Although the indictment alleged the commencement of the conspiring prior to the effective date of the Atomic Energy Act, according to the allegations, it was continuing when the Atomic Energy Act took effect and after it had repealed pro tanta the inconsistent penal provisions of the Espionage Act in so far as they might otherwise be applicable to the conspiracy with which the defendants were charged.

The Court in sentencing the defendants to death under the Espionage Act showed complete ignorance of the Atomic Energy Act. This appears from the following statements by the Court on the

occasion when sentence was pronounced:

> "At the outset, I would like to say a few words about the law under which these defendants are about to be sentenced. It provides for the following punishment: If the espionage or the conspiracy to commit espionage is committed during the time of war, the punishment might be death or imprisonment for not more than 30 years. If the espionage or conspiracy to commit espionage is committed at any other time the maximum punishment is imprisonment for not more than 20 years.
>
> "......
>
> "The incongruent penal provisions of the statute are spotlighted by the 20-year maximum imprisonment provision for commission of the offense of espionage during peacetime. I ask that some thought be given to that for the moment, for it most likely means that even spys (sic) are successful in the year 1951 in delivery to Russia or any foreign power our secrets concerning the newer type atom bombs, or even the H-bomb, the maximum punishment that any court could impose in that situation would be 20 years. I, therefore, say that it is time for Congress to re-examine the penal provisions of the espionage statute.
>
> "........
>
> ". . . In light of the circumstances, I feel that I must passsuch sentence upon the principles in this diabolical conspiracy to destroy a God-fearing nation, which will demonstrate with finality that this nation's security must remain inviolate;. . ."

Thus the judgment of the Congress was differed very widely from that of the Court in the case at bar with respect to punishment for conspiracies to transmit atomic information to foreign nations. The judgment of Congress is binding on this Court.

> "It is the legislature, not the Court, which is to define a crime and ordain its punishment." Morgan v. Denine, 237 U.S. 632, 35 S. Ct. Rep. 712, 59 L. Ed. 1153.

How the Defendants Were Prejudiced

If the defendants had been prosecuted under the Atomic Energy Act the death penalty could not have been inflicted for the offense with which they were charged. As has already been shown the penalty of death under the Atomic Energy Act can only be imposed on recommendation of the jury and then only when the jury finds that the accused had the intent to injure the United States. (Sec. 10(b) (2) (A)) The indictment in the case at bar did not charge that the defendants conspired with intent to injure the United States.

The court, however, instructed the jury that the matter of punishment was not in their hands, saying:

> "You are instructed that the question of possible punishment of the defendants in the event of conviction is no concern of the jury, and shoul' not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. You cannot allow a consideration of the punishment which may be inflicted upon the defendants to influence your verdict in any way; the desire to avoid the performance of an unpleasant task cannot influence your verdict." (Emphasis added) Printed transcript p. 1566

Furthermore, at the beginning of the trial when the jury was being selected, the court took particular pains to tell the jury that they should not let any qualms about capital punishment bother them; that the punishment was completely in the province of the court. Notwithstanding this instruction as to the law, the court, nevertheless excused a proposed juror who was opposed to capital punishment. No effort seems to have been spared that might impress upon the jury the enormity of the alleged offense while at the same time relieving their consciences of the punishment the court apparently stood so fully ready to pronounce if the jurors would only do the part that was assigned to them.

"The Court: Do you have any bias, prejudice or scruple against the enforcement of a law the violation of which is punishable by death or against being a juror in a capital case?

"Prospective Juror No. 1.: Your honor, I am prejudiced somewhat against capital punishment and I have so stated in the Supreme Court of the State of New York.

"The Court: Very well, We will excuse you.

"The Court: I want to tell the jurors that the matter of punishment, so that they understand it, is completely within the province of the court; that no time are they to consider the question of possible punishment. That is completely within my jurisdiction, not within the jurisdiction of the jurors, and I wouldn't want them to bebiased or prejudiced one way or the other by the fact that an individual juror may consider what possible punishment might result. That is within my province, not within the province of the jurors, and what I might or might not do will rest with my conscience if that time arrives."

Printed Record, p. 50.

Under the Espionage Act the penalty is the same whether the offense is done with the intent that it is to be used to the advantage of a foreign nation or merely with reason to believe that it is to be used to the advantage of a foreign nation. The Atomic Energy Act is not the same. Under the Atomic Energy Act, if the offense is committed with the intent to secure an advantage to any foreign nation the penalty is a fine of not more than $20,000 or imprisonment for not more than twenty years, or both. (Sec. 10(b)(a)(A)) If the offense is committed merely with reason to believe that the data will be used to secure an advantage to any foreign nation, the punishment is only $10,000 or imprisonment for not more than ten years, or both. (Sec. 10(b)(2)(B))

The indictment in the case at bar charged that the defendants conspired "with intent and reason to believe that it would be used to the advantage of a foreign nation..." (Printed Transcript p.2)

The Court's instructions dispensed with the necessity

of finding the intent. The jury were told that they should convict on finding that the defendants had reason to believe that the information was to be used to the advantage of the Soviet Union. In other words, as the statute (the Espionage Act) was explained to the jury, it was immaterial whether the defendants had the actual intent to confer an advantage on the Soviet Union or merely had reason to believe that the information they were charged with conspiring to communicate was to be used to the advantage of the Soviet Union.

The court gave the following instructions on this point:

> "Furthermore the statute requires that the alleged conspirators have intended or have reason to believe that the information to be obtained was to be used to the advantage of a foreign nation. This requires those prosecuted to have acted in bad faith. The sanction apply only when scienter or intent is established.
>
> "So you must find whether a conspiracy did exist and whether this conspiracy called for
> .....
> (4) intending or with reason to believe that the information was to be used to the advantage of the Union of Soviet Socialists." (Emphasis added)
> Printed Transcript, p. 1884.

Since the jury found the defendants "guilty as charged" it is altogether impossible to know whether they found that the defendants intended to secure an advantage to the Soviet Union. They may have rendered the verdict because they thought the defendants simply had reason to believe that such data would be utilized to secure an advantage to the Soviet Union. Therefore, if the case had been tried under the Atomic Energy Act the court would not have been authorized to impose the punishment prescribed by subsection (A) which was a fine of not more than $20,000 or imprisonment for not more than twenty years. The maximum punishment that

could have been imposed would have been that provided in sub-section (B) viz., a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

(b) Due to lack of any particulars in the indictment, counsel for the defendants was not enabled to prepare his defense so as to challenge the court's attention to the fact that the alleged conspiracy embraced objects that would if they had been accomplished have amounted to the commision of a number of separate offenses with widely varying penal consequences for these defendants. The court, obviously on this account, mislead the jury by treating the case as if the defendants were being tried for some kind of broad, general conspiracy to spy on the United States--a kind of composite conspiracy embracing all the harm or evil that any one could do to the United States by obtaining and transmitting information that had not been made public at the time of the alleged conspiracy.

In instructing the jury the court said:

> "The defendants are accused of having conspired to commit espionage. Espionage, reduced to essentials, means spying on the United States to aid a foreign power."

This was an inaccurate and misleading charge. There is no offense of "espionage". The statute generally known as the "Espionage Act" defines with particularity a number of separate and distinct offenses and conspiracies of this nature which fall into one or the other of the categories of offenses.

To support the indictment the prosecution introduced evidence in the attempt to connect Julius and Ethel Rosenberg with some sort of a conspiracy with Morton Sobell and Max Elitcher.

The theory of the prosecution as submitted to the jury was stated by the court as follows:

> "The prosecution claims that the defendants on trial conspired together with each other, that is, Julius Rosenberg, Ethel Rosenberg, Morton Sobell and David Greenglass, Ruth Greenglass, and Harry Gold, to communicate, deliver and transmit to the Union of Soviet Socialist Republics, and representatives and agents thereof, documents

and information relating to the national defense of the United States, with intent and reason to believe that it would be used to the advantage of the Union of Soviet Socialist Republics; that the representative of the Union of Soviet Socialist Republics for the purpose of receiving the secret information was Anatoli A. Yakovlev, who was a Vice-Consul for the Union of Soviet Socialist Republics at its legation in New York City and who left the country in December 1946.

"The prosecution further contends that Julius and Ethel Rosenberg, David and Ruth Greenglass, Morton Sobell and Harry Gold were part and parcel of this conspiracy to obtain banned information and to transmit it to Yakovlev, the Russian representative, and that clandestine and fraudulent devices were resorted to in obtaining this information.

"The prosecution alleges that Morton Sobell was a friend of Julius Rosenberg and of Max Elitcher from their college days until recently. It is the prosecution's contention that Sobell was part of the conspiracy to transmit secret information to Russia and that he suggested Elitcher as a [fols. 2347-2347a]

". . .

"The prosecution further claims that it was also a part of [fol. 2349] this same conspiracy to obtain information regarding the atomic bomb project;. . ."

By the court's instructions, it will be noted, the theory of one conspiracy the accomplishment of which would involve the commission of a number of separate substantive offenses was adopted.

Counsel for the defendant Sobell moved to dismiss the indictment on the ground that not one but two separate conspiracies had been proved by the government. As stated by the Court of Appeals, the two conspiracies which Sobell contended were proved were:

"One involving Rosenberg, Greenglass and Gold, whose purpose was the transmission of atomic information, and the other involving Rosenberg and Sobell, aimed solely at the sending of various types of military information abroad."

The Court of Appeals further said:

"The motion was denied; the trial judge committing himself to the theory that the government's witnesses if believed, proved one giant conspiracy to send defense information abroad, of which the atomic espionage was only one 'branch'".

The majority of the Court of Appeals sustained the court's ruling. Judge Frank dissented, expressing the opinion that

"The Judge's instructions (quoted above) do not, I think, make it clear to the jury that Sobell in order to become a member of the larger conspiracy, had to agree to transmit all kinds of secret information, and not just certain kinds which he knew about."

In submitting the case to the jury the court ruled there was only one conspiracy, that Sobell being in the conspiracy for one purpose was in it for all purposes, but in pronouncing sentences on the verdict the court ruled that there were two conspiracies saying:

"I do not for a moment doubt that you were engaged in espionage activities; however, the evidence in the case did not point to any activity on your part in connection with the atom bomb project."

How the Defendants were Prejudiced

The Government's theory of the nature and objects of the alleged conspiracy as submitted by the court to the jury included beside atomic information, the following:

The solicitation of Elitcher for classified information from the Navy Department and in particular a fire-control report.

Sobell's asking Elitcher if he knew any progressive electrical engineers for espionage purpose.

Rosenberg trying to persuade Elitcher to stay in Washington to "work in the Navy Department".

Statements to Greenglass concerning mathematical data on atomic energy for airplanes, information relating to a "sky platform" project, and "other information obtained by Julius from scientist contacts in the country."

Mentioned by the Court of Appeals but not submitted by the trial court to the jury were:

"Elitcher accompanied Sobell to deliver 'valuable information' in a 35-millimeter can to Julius" and

Greenglass' testimony that Rosenberg told him that he had stolen a proximity fuse and given it to the Russians.

No argument should be required to persuade the court that even if any or all of this evidence could be treated as evidence concerning atomic information, it could not justify the imposition of the death penalty; for the incontrovertible fact is that the sole reason why the court pronounced the death sentence is the court's own finding, not that the defendants conspired to transmit atomic

information to the Soviet Union, but that they actually passed the atomic bomb to the Soviet Union thereby causing the Korean war.

Therefore, the case takes on this most unjudicial aspect:

For conspiracy, as alleged in the indictment, to transmit atomic information, the defendants could lawfully be punished only under the Atomic Energy Act with a maximum penalty, as shown above, of a fine of not more than $10,000 or not more than ten years imprisonment or both.

If the conviction under the Espionage Act is held to be supportable by the other evidence tending to show that the conspiracy had as objects other substantive offenses and the various objects mentioned above--none of which could by any process of reasoning, warrant a severe penalty--the court on the theory of a single conspiracy embracing the transmission of atomic information finds justification for pronouncing the sentence of death, although it could not be done under the Atomic Energy Act.

This is not due process of law. The defendants have not had a fair trial. The very purpose of the constitutional requirement in the Sixth Amendment that they be informed in advance of trial by an indictment of the Grand Jury--and not after they have spent two years in a death cell awaiting electrocution--will have been violated.

VI

The defendants have been deprived of due process of law in that the judgment rendered against them is not compatible with the verdict because

(a) The defendants were adjudged to be guilty of the offense of conspiring to transmit information relating to the national defense in time of war (punishable as provided by Sec. 794(b) of Title 18 U. S. C.) whereas they were charged by the Grand Jury and convicted by the verdict of the traverse jury only with conspiring in time of war to transmit information etc. without any

information in time of war (and therefore the offense punishable as provided by Sec. 794(a) of Title U. S. C. corresponding to but superseding Sec. 38(a) of Title 50 U. S. C. mentioned in the indictment.)

(b) The element differentiating the offense defined by Sec. 794(b) from the one defined by Sec. 794(a) viz., that the alleged conspirators conspired and agreed that the object of transmission was to be accomplished in time of war, under the evidence introduced by the Government to sustain the prosecution - if the indictment were in anywise susceptible of the interpretation placed upon it by the court in its ruling of June 1, 1953 - raised a highly important issue of fact which was not submitted to the jury and could not be decided by the court without invading the province of the jury and denying the constitutional rights of the defendants to have the whole case submitted to the jury.

How the defendants have been prejudiced

The Grand Jury found that

"1. On or about June 6, 1944, up to and including June 16, 1950 ..... the defendants herein, did, the United States of America then and there being at war, conspire, combine, confederate and agree ....." (Emphasis added)

The court, by its ruling on June 1, 1953, has held that the phrase "then and there being at war" may be transposed so as to serve the purpose of qualifying the part of the indictment that follows and describes the allegations concerning the transmission of information, i.e., the object of the conspiracy.

In the grammatical setting in which the Grand Jury placed the phrase it appears between the words "did" and "conspire". In order to make the transposition which the court has contended may be done in order to sustain the judgment and sentence, the phrase would have to be lifted out of context and set at the end of the paragraph 115 words further on. The process may be shown thus:

" . . . the defendants herein, did,

conspire, combine, confederate and agree with each other and with Harry Gold and Ruth Greenglass, named as co-conspirators but not as defendants,

and with divers others presently to the Grand Jury unknown, to violate subsection (a) of Section 32, Title 50, United States Code, in that they did conspire, combine, confederate and agree, with intent and reason to believe that it would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the National Defense of the United States of America, while the United States of America was then and there at war."

It is submitted that no one could possibly misunderstand the plain, ordinary, natural meaning of the clause as used in the indictment. It being stated that the conspiracy commended June 6, 1944, and continued up to and including June 16, 1950, the Grand Jury added parenthetically "the United States then and there being at war."

The court in its ruling of June 1, 1953, further stated that there was no doubt that it was understood by counsel for all the defendants that the clause modified and referred to the latter part of the paragraph of the indictment about the transmitting, and said:

" ... and all were aware that the defendants were charged not only with having conspired during wartime, but that the object of that conspiracy was to transmit information to the Soviet Union during wartime."

It is submitted that the record conclusively shows it was not contended by prosecution counsel at any time before the verdict that the object of the conspiracy was to transmit information to the Soviet Union during wartime, and, apparently, neither the court nor the defense counsel were aware of the materiality of this element as to time until the judgment was rendered when, for some unexplained reason the phrase "the United States then and there being at war" was omitted from the conspiring part and the words "in time of war" were added at the end of the finding part of the judgment so as to refer to the time of the transmission which was adjudged to be the object of the conspiracy.

The jury found the defendants "guilty as charged". The judgment was therefore made to rest on something which was added to the verdict. This was not a mere matter of form. It supplied in the judgment the very ingredient that was essential in order to

render the offense punishable by death under Sec. 794 (b). By well settled principles of criminal law the judgment, therefore, cannot be sustained. This essential ingredient of that offense was not found by the Grand Jury or the traverse jury.

The statement by the court on June 1, 1953, that "all" were aware that the defendants were charged not only with having conspired during wartime, but that the object of the conspiracy was to transmit information to the Soviet Union during wartime, is rebutted by the court's statement in pronouncing sentence. On that occasion, the court stated that the death penalty was applicable because the conspiracy commenced while the United States was at war, saying:

> "In the case before me the conspiracy as alleged and proven commenced on or about June 6, 1944 at which time the country was at war. Overt acts were committed during the period of actual hostilities. Therefore, the maximum penalty is death or imprisonment for not more than thirty years."

Clearly the court at that time was not aware that in order for the death penalty to be imposed it was necessary for the defendants to have been charged in the inductment by the Grand Jury and found guilty by the traverse jury of conspiring to transmit the information in time of war. The truth is that the court, the prosecution and counsel for the defense were suffering from a very serious misconception about the law. They all thought that the punishment depended on the time of the conspiring alone, whereas the time of the conspiring is immaterial as regards the punishment. It was the substantive offense, the object of the conspring that determined the punishment. Inasmuch as in criminal law, an indictment cannot be aided by any intendment or presumption and the accused are entitled to invoke the rule of strict construction, it is altogether impossible to sustain the indictment as one charging the offense punishable under Sec. 794 (b) of Title 18 by death or imprisonment for not more than thirty years. The Grand Jury did

not find that the defendants conspired to violate Sec. 32 (a) of Title 50 U.S.C. in time of war. The prosecution and the court cannot add a line or even a word to the indictment.

Moreover, the judgment and sentence are not sustainable on the ground that overt acts stated in the indictment occurred in time of war. The Supreme Court has held repeatedly that the statement of the overt acts does not aid the allegations as to the object of the conspiracy. Besides, no overt act stated in the indictment supports any inference that the transmission of information alleged to have been received by Julius Rosenberg was intended to be effected in time of war. None of the overt acts refer in any way to any agreement or object looking to the transmission of the papers and sketches to the Soviet Union.

Taking the indictment as a whole, no inference that transmission was to be accomplished "while the United States of America was then and there at war" (the clause added at the end of the paragraph of the judgment containing the finding of the offense) could reasonably be drawn. It was not so charged by the Grand Jury either by way of a conclusion of law nor by any allegations of facts that the transmission was intended to be accomplished in time of war.

In order for the death penalty to be imposed under the Espionage Act, it was essential not only that the Grand Jury specifically charge that the transmission was intended to be accomplished in time of war, i.e., was the object of the conspiracy; it was necessary also that the jury find this specific object to have been proven beyond a reasonable doubt. In the case at bar, it is impossible to maintain that the jury did so find, because there was no submission of this element to the jury by the court. At no time did the court so much as indicate to the jury that it was their duty to determine whether or not the alleged conspiracy and agreement

contemplated the transmission of the information relating to the national defense of the United States during the time the country was at war.

Upon the jury being impanelled the court instructed them as follows:

> "The Court: Now ladies and gentlemen of the panel these defendants are charged with violating the statute which reads in part as follows. I will eliminate the surplusage:
>
> > 'If two or more persons conspire to violate the provisions of Section 32 or 33 of this title and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished et cetera, et cetera'
>
> "Now it is alleged that the defendants in the indictment conspired to violate Section 32 which was referred to in the foregoing statute I have just read.
>
> "Section 32 provides in part as follows:
>
> "Whoever with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation communicates, delivers, or transmits or attempts or aids or induces another to communicate, deliver or transmit to any foreign government or to any faction or party or military or Naval force within a foreign country whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof either directly or indirectly any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance or information relating to the National Defense shall be punished, et cetera, et cetera.'" (Tr. pp 54-55)

It will be noticed that the words "et cetera, et cetera," were read into the statute by the court. Thus, the attention of the jury was not called to the proviso of Sec. 32 providing that if the violation occurred in time of war for the penalty of death or imprisonment for not more than thirty years.

In giving the final instructions to the jury, the court by reading into the statute the phrase "according to law," again avoided telling the jury that a conspiracy to commit the offense covered by the Provided part of Sec. 32 carried the death penalty. The court said:

> "As I instructed you when the jury was chosen, the defendants are accused of violating the statute which reads in part as follows:

'If two or more persons conspire to violate the provisions of Sections 32 and 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished <u>according to law</u>.'

Now, it is alleged in the indictment that the defendants conspired to violate section 32, which has been referred to in the law I have just read. Section 32 provides in part that

'Whoever, with the intent or reason to believe that it is to be used ... to the advantage of a foreign nation, communicates, delivers or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government ... or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing ..., sketch, ... note, ... or information relating to the national defense, shall be punished <u>according to law</u>.'" (Emphasis added)

<u>Thus, the court was at considerable pains to strip from the statutes read to the jury those provisions having to do with the punishment and especially the provision about the death penalty</u>.

In his summation, Mr. Saypol made no contention whatsoever that the object of the alleged conspiracy was the transmission of the information to the Soviet Union during the time the United States "was then and there at war."

The first time that the time element as regards the object of the alleged conspiracy was raised appears to have been on the occasion of the sentence. On that occasion Mr. Saypol argued as follows:

"The penalty for conspiracy to commit espionage, the crime for which these defendants stand convicted, since the first enactment of the law, particularly since 1917, provides that a convicted defendant shall be imprisoned not more than 20 years, but follows this proviso:

'(b) whoever violates this law in time of war shall be punished by death or by imprisonment for not more than 30 years.'

This is the applicable provision here."

The foregoing statement was misleading because it implied that subsection (b) (Sec. 794, Title 18 U.S.C.) provided the death penalty when a <u>conspiracy</u> to "commit espionage" is formed in time of war. Moreover, the reference to the statute was inaccurate. The indictment charged the defendants only with <u>conspiring</u> to violate not sub-

section (b) but subsection (a) (Sec. 32 (a) of Title 50 U.S.C.) the punishment for which was a maximum of twenty years imprisonment.

Counsel for the defendants, however, allowed this erroneous statement and erroneous quotation from the statutes by prosecution counsel to pass unchallenged and uncorrected.

Thereupon, the court fell into the error which Government's counsel had induced saying:

"Sentences

"The Court: .....

"At the outset I would like to say a few words about the law under which these defendants are about to be sentenced. It provides for the following punishment: If the espionage or the conspiracy to commit espionage is committed during the time of war, the punishment might be death or imprisonment for not more than 30 years. If the espionage or conspiracy to commit espionage is committed at any other time the maximum punishment is imprisonment for not more than 20 years." (Emphasis added)

Counsel for the defense still did not notice this very serious misinterpretation of the statute. It was because of this error of the court, the prosecution and defense counsel in assuming that a conspiracy begun in time of war was punishable by death irrespective of the time when the object of the conspiracy was to be accomplished that resulted in the unauthorized sentence of death. On account of this error Julius and Ethel Rosenberg have been deprived of their liberty without due process of law by solitary confinement in death cells at Sing Sing prison for more than two years.

The indictment, by omitting the allegation that the object of the conspiracy was to transmit information during the time the United States was at war, fails to charge a crime punishable under Sec. 794 (b), but instead related only to Sec. 794 (a). The omission is a matter of substance, and not a defect or imperfection in matter of form only. This omission cannot be supplied by examination of the evidence. Even if all the evidence tended to show that the object of the conspiracy was the delivery

of information in time of war - which is by no means true - the verdict would be a finding by the jury only of those elements that were well charged in the indictment and submitted by the court to the jury.

It is not within the power of the court to exercise the function of the jury by making a finding of this controlling issue of fact so as to sustain the sentence and judgment that have been rendered. The court's power was limited to giving correct instructions to the jury and thereby aiding the jury in the determination of this as well as other ingredients of the offense. In the Gorin case, the Supreme Court said:

> "The question of the connection of the information with the National Defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined."

The same rule applies with respect to this other ingredient (necessary to the conviction of an offense under Sec. 974 (b)) that the object of the conspiracy is to be accomplished in time of war.

(b) The defendants for the reasons shown above have been sentenced to death in violation of

1. The sixth Amendment requiring prosecution for such offenses to be by indictment informing the accused of the nature and cause of the accusation, and

2. The guaranty of a trial by a jury of all issues of fact.

VII

No conviction under this particular indictment by which the defendants were charged could be predicated on the 1917 Espionage Act (Sec. 794 (a), Title 18 U.S.C., superseding Sec. 32 (a), Title 50 U.S.C.) on account any conspiracy, combining, confederation, or agreement by the defendants to communicate information relating to the national defense of the United States to the Union of Soviet Socialist Republics during the period of the alleged conspiracy because

(a) the defendants were not charged by the Grand Jury with intent or reason to believe that the information would be used to the injury of the United States of America, and

(b) There are no ascertainable juridical standards by which a jury could assess guilt of a criminal act merely because of intent or reason to believe that the information would be used to the advantage of the Union of Soviet Socialist Republics, either during the period of the alleged conspiracy or afterwards.

The indictment charges that the conspiracy began on or about June 6, 1944. All the overt acts stated in the indictment occurred between that date and June 1945. During this period the United States and the Soviet Union were jointly engaged in a war against Germany and Japan and by Presidential Proclamation, pursuant to the grant of authority from the Congress, it was declared as the official government policy of the United States that the defense of the Soviet Union was vital to the defense of the United States. This Court is bound to take judicial notice of the following statutes, treaties and international agreements, all of which continued in effect during the period in which

all the overt acts were committed and long afterwards.

(1) On January 1, 1952 the representatives of the United States and the Soviet Union, along with 24 other nations, subscribed to "a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Carter." This Joint Declaration was known as the Declaration by the United Nations. By the Declaration each government pledged itself "to employ its full resources, military and economic, against those members of the Tripartite Pact and its adherents with which such government is at war." (In addition to the original signatories, 21 other nations adhered to the Declaration.)

(2) By the terms of the Lend-Lease Act (Mar. 11, 1941, c 11, 55 Stat. 31) the President was empowered, notwithstanding the provisions of any other law, from time to time, when he deemed it in the interest of national defense to authorize the Secretary of the Army, the Secretary of the Navy, or the head of any other department or agency of the Government to sell, transfer title to, exchange, lease, lend, or otherwise dispose of to any country "whose defense the President deems vital to the United States" any defense article, defined to mean any weapon, and to communicate to any such government any defense information pertaining to any defense article furnished to such government. (Sec. 411 and 412 Title 22 U.S.C.)

Pursuant to the above authority the President determined that the defense of the Union of Soviet Socialist Republics was vital to the defense of the United States. Under date of June 11, 1942 a preliminary agreement between the United

States of America and the Union of Soviet Socialist Republics was entered into with respect to the principles applying to mutual aid in the prosecution of the war. (Executive Agreement Series 253, 56 Stat. 1500)

This agreement or treaty recites in part as follows:

> "Whereas the Governments of the United States of America and the Union of Soviet Socialist Republics declare that they are engaged in a cooperative undertaking, together with every other nation or people of like mind to the end of laying the bases of a just and enduring world peace securing order under law to themselves and all nations
>
> "And whereas the Governments of the United States of America and the Union of Soviet Socialist Republics, as signatories of the Declaration by United Nations of January 1, 1942, have subscribed to a common program of purposes and principles embodied in the Joint Declaration, known as the Atlantic Charter, made on August 14, 1941, by the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland, the basic principles of which we e adhered to by the Government of the Union of Soviet Socialist Republics on September 24, 1941
>
> "And whereas the President of the United States of America has determined, pursuant to the Act of Congress of March 10, 1941, that the defense of the Union of Soviet Socialist Republics against aggression is vital to the defense of the United States of America
>
> "And whereas the United States of America has extended and is continuing to extend to the Union of Soviet Socialist Republics aid in resisting aggression
>
> * * *
>
> "Art. 1. The Government of the United States ofAmerica will continue to supply the Government of the Union of Soviet Socialist Republics with such defense articles, defense service and defense information as the President of the United States of America shall authorize to be transferred or provided.

"Art. II. The Government of the Union of Soviet Socialist Republics will continue to contribute to the defense of the United States of America and the strengthening thereof and will provide such articles, services, facilities or information as it may be in a position to supply.

* * *

"This agreement shall take effect as from this day's date. It shall continue in force until a date to be agreed upon by the two Governments.

"Signed and sealed at Washington in duplicate this eleventh day of June, 1942.

For the Government of the
United States of America.

by Cordell Hull"

(Emphasis added)

(3) The "Lease-Lend Act" was amended by acts March 11, 1943, May 17, 1944, April 16, 1945. As amended by the last mentioned act, the law provided:

"(c) After June 30, 1945, or after the passage of a concurrent resolution by the two houses before June 30, 1946, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1949, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such foreign government made before the passage of such concurrent resolution, whichever is earlier; ..."

According to Soviet Supply Protocols (Dept. of State Publication No. 2759, U. S. Government Printing Office) the procurement and shipment of supplies under the Lease-Lend Act by the United States to the Soviet Union continued without interrruption from October 1, 1941, to May 12, 1945. This official report states:

"Supplies furnished by the United States after May 12, 1945 were limited to those required for the support of Soviet Forces in the Far East

..... After the termination of the Fourth Protocol period on June 30, 1945, supplies listed in the annex III which had not yet been shipped, together with other supplies for support of military operations in the Far East, were forwarded without the formal commitments of a protocol." ...
.....

"Supplies furnished to the Soviet Government after the close of hostilities on September 2, 1945, were provided under the terms of a separate agreement dated October 15, 1945, executed under the authority of Section 3(c) of the Lend-Lease Act."

Soviet Supply Protocols, Foreword iii-iv

The Fourth Protocol between the Union of Soviet Socialist Republics and the United States, United Kingdom and Canada for the period July 1, 1944 to June 30, 1945, recites:

"The Government of the United States, the Government of the United Kingdom and the Government of Canada recognizing the outstanding contribution of the Union of Soviet Socialist Republics in the prosecution of the common war against the common enemy, and desiring to continue to provide the Government of the Union of Soviet Socialist Republics with the maximum assistance possible in meeting its war needs in the form of military supplies, raw materials, industrial equipment and food .....

"It is desired to emphasize that the Government of the United States is not only willing but is very anxious to render the assistance outlined." (Emphasis added)

Soviet Supply Protocols, pp. 89, 94

(4) On February 11, 1945, Winston S. Churchill, Prime Minister of Great Britain, Franklin D. Roosevelt, President of the United States, and J. Stalin, Prime Minister of the Union of Soviet Socialist Republics, joined in a declaration about their eight day Crimean Conference saying:

"Our meeting here in the Crimea has reaffirmed our common determination to maintain and strengthen in the peace to come that unity of purpose and of action which has made victory possible and certain for the United Nations in this war .....

"Only with the continuing and growing cooperation and understanding among our three countries and among all the peace-loving nations can the highest aspiration of humanity be realized--a secure and lasting

peace which will, in the words of the Atlantic Charter, 'afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.'"

President Truman in his radio speech August 9, 1945, reporting on the Berlin Conference, declared:

"The three great powers are now more closely than ever bound together in determination to achieve ..... peace!

"From Teheran, and the Crimea and San Francisco. and Berlin -- we shall continue to march together to our objective."

(5) On October 7, 1945, a date subsequent to the last overt act stated in the indictment, President Harry S. Truman in an address at Coruthersville, Missouri, declared:

"Just to rehearse for your benefit a few of the things that have happened since April 12, 1945, just about six months ago. The San Francisco Conference was convened on the 25th day of April, just thirteen days after I was sworn in as President of the United States.

"The conference was successful, and just about four months after it was convened, the United States approved the Charter of the United Nations by an overwhelming majority. There were only two Senators against it, and I never did understand why they were against it.

"At any rate the United States entered on an entirely new development of its foreign policy.

"Some three months after that I went to Berlin to meet with the heads of the Governments of Russia and Great Britain in order to discuss the world outlook for the coming peace.

"The deliberations of that conference will be felt for generations in the final peace.

"Just a little less than a month after I became President, that is twenty-six days after I was inaugurated, the Axis Powers in Europe folded up.

"On the twelfth day of August, Japan folded up. In the meantime the most earth-shaking discovery in the history of the world was made, the development of atomic power.

"That discovery was used in the last war effort against Japan, and the effect of that atomic bomb is too terrible for contemplation. But we have only begun on the atomic energy program. That great force, if properly used by this country of ours and by the world at large, can become the greatest boon that humanity has ever had.

"It can create a world which, in my opinion, will be the happiest world that the sun has ever shone upon .....

"... We must cooperate now as we never have before in the history of the country .....

"..., we can show the rest of the world the road to liberty and to peace.

.....

"We may make mistakes. We may have difficulties, but I am asking you to exercise that admonition which we will find in the gospels and which Christ told us was the way to get along in the world.

'Do by your neighbor as ye would be done by.'

"And that applies to you and you just as it applies to Great Britain and France and China and Russia and Czechoslovakia and Poland and Brazil. The nations, when they decide that the welfare of the world is much more important than any individual gain which they can themselves make at the expense of another nation, then we can take this discovery which we have made and make this world the greatest place the sun has ever shone upon.

.....

"We can't stand another global war. We can't ever have another war unless it is total war, and that means the end of our civilization as we know it. We are not going to do that. We are going to accept the Golden Rule, and we are going forward to meet our destiny, which I think Almighty God intended us to have, and we are going to be the leaders."

The treason statute and certain sections and paragraphs of the Espionage Act define crimes, all of which are based on the intent, knowledge or reason to believe that the acts prohibited would injure the United States and confer a military advantage on the enemy in war. Where the communication of information relating to the national defense of the United States is made to an enemy power in

time of war, logically, it would seem that an advantage to the foreign nation would be an injury to the United States. Where the foreign nation is not an enemy in war, but an ally in war, whose defense is vital to the defense of the United States, and the full resources of both nations have been legally and constitutionally pledged to the successful conclusion of the war, no circumstance suggests itself where communication of information relating merely to the defense of the United States to the advantage of that ally would be an injury to the United States. Certainly there is no standard by which criminality could be based on communication of defense information merely with intent or reason to believe that it would be used to the advantage of the foreign nation. The advantage to the foreign nation is at once the advantage of the United States and no crime can be imputed to such communication - whether with or without official permission from the President or military authorities of the United States.

(c) The Court in effect instructed the jury that guilt could be predicated solely on "memb ership or activity in the communist party," saying:

> "I want to explain and define several terms in the statute and in the indictment itself.
>
> "The charge is that of conspiring to transmit information relating to the national defense to the advantage of a foreign nation--please note that I said a 'foreign nation.' This means that there are some types of information relating to the national defense which must not be given to a friendly power, not even to an ally. It has been said by a Justice of the Supreme Court,
>
> 'No distinction is made between friend and enemy. Unhappily the status of a foreign government may change.'

"O charge you that whether the Union of Soviet Socialist Republics was an ally or friendly nation during the period of the alleged conspiracy is immaterial, and you are not to consider that at all in your deliberations.

.....

"It is contended by the Government that the defendants intended to benefit Russia and that their membership in the Communist party and adherence to its principles showed a preference for the Soviet form of government.

"Now I wish to instruct you at this point that I have admitted testimony as to membership or activity in the Communist party and also testimony to the effect that the Communist party is dedicated to furthering the interests of the Union of Soviet Socialist Republics solely on the question of the defendants' intent or reason to believe that the alleged secret information to be transmitted would be used to the advantage of a foreign nation, in this case the Union of Soviet Socialist Republics, which is an element of the charge that the Government must prove beyond a reasonable doubt."

In pronouncing sentence on the defendants the Court said:

"Nor can it be said in mitigation of the offense that the power which set the conspiracy in motion and profited from it was not openly hostile to the United States at the time of the conspiracy. If this was your excuse the error of your ways in setting youselves above our properly constituted authorities and the decisions of those authorities not to share the information with Russia must now be obvious."

To sustain the foregoing instruction would be to hold that it is within the judicial power to set aside retroactively the decisions and judgments of the legislative and executive branches of the government made and acted upon in time of war. The statement of the Court, "Nor can it be said in mitigation of the offense that the power which set the conspiracy in action and profited from it was not openly hostile to the United States at the time of the conspiracy" is contradicted by the statutes, treaties and agreements and Presidential proclamations during the period of the alleged conspiracy. By settled principles, the decisions of the

Congress and the President in the field of international relations, especially in the prosecution of a declared war, are binding and conclusive on the courts.

On the principles of the Gorin case it was the duty of the Court to give proper instructions to the jury to guide its application of the statute to the facts. There was no proper instruction on this vital and controlling issue. Instead the Court gave instructions which allowed a decision to be made by them on passion, prejudice or their own political views towards communism.

This instruction and the heavy emphasis placed by the prosecution during the taking of the evidence and in argument upon this inadmissible factor was bound to have improperly influenced the jury's deliberation to such extent as to impair the fairness of the trial and deprive the defendants of their constitutional rights.

(d) There is no evidential basis for imputing to the defendants any reason to believe, either at the time of the commencement of the alleged conspiracy or during the period of the overt acts (1944-1945), that the information which they are charged with conspiring to transmit would be used to the advantage of the Soviet Union after the end of the war between the United Nations and the Axis Powers.

This case cannot be decided correctly without recognition of the fact that the defendants are accused of conspiring during the time the United States, the Soviet Union and the other United Nations were at war. The commencement of the conspiracy, according to the Government's contention, antedated the development and use of the atomic bomb and the end of the hostilities in that war by more than one year. Justice in this case will be denied unless it

is remembered that between September, 1945, when David Greenglass testified he delivered a sketch of the atomic bomb to Julius Rosenberg, and March, 1951, when they were on trial before the United States District Court in New York, five and one-half years had elapsed. In those five years many remarkable things happened, which neither Julius Rosenberg nor any mortal then living was capable of foreseeing. Looking backward from March, 1951, to the time when the startling news of the atomic bomb was given to the world, we tend to assume the state of affairs in 1944 and 1945 to be the same as the state of affairs in 1950 and 1951, but this we must not do.

1. Assuming the testimony of Ruth and David Greenglass concerning Julius Rosenberg's request that they obtain for him Los Alamos information to be literally true, it is still impossible to hold that Rosenberg then, in 1944 or 1945, had reason to believe that the information to be gathered would be used to the advantage of the Soviet Union in any such way as the Congress of the United States had the right or authority to prohibit. The Government does not contend that Julius Rosenberg was possessed of the power of clairvoyance. Neither was it shown that Ruth Greenglass or David Greenglass - though the latter was an avid reader of science fixtion while he was in jail and allowed his imagination to play with such fantasies as space ships and atomic-powered airplanes - were invested with any kind of supernatural intuition.

Yet, by the Government's proof, the jury was expected to be convinced beyond a reasonable doubt that in November, 1944 - at a time when the carpenter's scaffolding had probably not beer removed from the first buildings out

in the New Mexico desert where the secret of harnessing the explosive power of the atom was to be unlocked months later, in a New York apartment Julius Rosenberg and Ruth Greenglass engaged in political forecasting so remarkable as to make Nostradamus appear as a piker.

Peering far into the future, Rosenberg tells Mrs. Greenglass - so Mrs. Greenglass swore - about his deep concern (it will be noted that the year was 1944 and not 1945) - that the United States and Great Britain, then working on the project of making an atomic bomb, would not share the information with their ally, Russia, and further about his conviction that "if all nations had the information then one nation couldn't use the bomb as a threat against one another."

That, of course, speaks highly of Julius Rosenberg's oracular powers. At this point Mrs. Greenglass, whose gifts inclined hardly as sharply towards prophecy as towards political sagacity, counselled that "the people who are in charge of the work on the bomb were in a better position to know whether the information should be shared or not."

It is hard enough to believe that Julius Rosenberg in January, 1945, before David Greenglass went to Los Alamos was able to give him a description of the atom bomb that was dropped on Hiroshima. (Testimony of David Greenglass, page 688 et seq.) Perhaps it cannot be irrebutably proven that he could not then have collated all the experiments and developments from three or four sprawling laboratories and plants and applied the knowledge of physics of Dr. Urey, Dr. Oppenheimer, Dr. Bethe, Dr. Szilord, plus Fuchs, and anticipated their discoveries. But, the human mind cannot be required to accept as the gospel truth that Julius Rosen-

berg and Ruth Greenglass, too, were capable of so anticipating the most remarkable and unforeseeable political developments that ensued subsequent to the discovery of the secret of the atom in July, 1945!

Waiving altogether the inherent improbability of such talks between the Rosenbergs and the Greenglasses ever having occurred before the statesmen and pollicy-making internationalx experts engaged their minds with the problems that arose after and not before Hiroshima and Nagasaki were bombed, it is as a matter of law quite impossible to hold that, even if all the testimony of the Greenglasses, though squarely denied by the Rosenbergs, is to be accepted as literally true, the statements as to the objects of the conspiracy made by Rosenberg would make the enterprise a criminal one under the laws of the United States.

Assuming that Rosenberg's object was to prevent what the trial court termed "the competitive advantage held by the United States in super-weapons," his purpose would nevertheless not be contrary to the laws and established policy of the United States at the time of the existence of the alleged conspiracy. At that time, in 1944 and 1945, and for many months thereafter the United States was bound (and even up to the present time, still is bound) by international treaties, agreements and assurances, not to use the atom bomb as a threat against any other nation.

These treaties, agreements and assurances are:

(A) The Treaty for the Renunciation of War (Kellog-Briand Pact), the obligations of which were stated in the following terms:

"Article 1

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of International controversies,

and renounce it as an instrument of national policy in their relations with one another.

"Article II.

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

(From Text of Treaty for the Renunciation of War (46 Stat. 2343, 2345))

"NOW, THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

(Proclamation by the President of the United States That the Treaty for the Renunciation of War Had Gone Into Effect. (46 Stat. 2347))"

(B) The Atlantic Charter and United Nations Declaration

The United Nations Declaration and the Atlantic Charter were published in 55 Stat. 1600. The Atlantic Charter, among other things, stated:

"They believe that all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force."

and

". . . no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside their frontiers . . ."

In addition to the original twenty-six signatories, twenty-one nations during World War II adhered to the United Nations Declaration.

(C) The United Nations Charter

On June 26, 1945, the Charter of the United Nations was signed at San Francisco, and was proclaimed by President Harry S. Truman to be effective October 24, 1945. In pursuance to law, The Charter and the President's Proclamation were published in 59 Stat. 1031. The Proclamation states that it was proclaimed:

". . . to the end that the same and every article and clause thereof may be observed and fulfilled with good faith, on and from the twenty-fourth day of October, one thousand nine hundred, forty-five, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof."

By Article 2, Section 4 of the United Nations Charter, it is provided:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations"

One of the principal Purposes of the United Nations was stated by the Charter to be:

"Article I

"The Purposes of the United Nations are:

"1 To . . . bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

(D) The Charter and Judgment of Nuremberg

During World War II and immediately following the cessation of hostilities in that War, the government of the United States joined with twenty other United Nations governments in the creation of an International Military Tribunal for the prosecution and punishment of major war criminals of the European Axis. President Harry S. Truman, acting under the authority vested in him as President and Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, by Executive Order 9547, dated May 2, 1945, designated Robert H. Jackson, Associate Justice of the Supreme Court, as the Representative of the United States and as its Chief of Counsel to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States might agree with any of the United Nations to bring to trial before an international military tribunal.

By Executive Order Number 9626, dated September 24, 1945, the said Harry S. Truman

in his capacity as President, and in virtue of the authority above mentioned, appointed the member and alternate member of the United States of the International Military Tribunal established for the trial and punishment of the major war criminals of the European Axis.

In pursuance to law, the agreement signed in London August 8, 1945, providing for the creation of the International Military Tribunal and the Charter of the Tribunal, were published as Executive Agreement Series 472, in 59 Stat. 1544.

By the Charter of the International Military Tribunal, formulated by Justice Robert H. Jackson, as the United States Representative, and by the Representatives of the Provisional Government of the French Republic, the Government of the United Kingdome of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, the following fundamental principles of law were declared:

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) CRIMES AGAINST PEACE: namely; planning, preparation, initiations, or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy for the accomplishment of any of the foregoing;

* * * *

The Nuremberg Tribunal in its Opinion and Judgment applying the principles of the Charter in October, 1946, declared:

"The question is what was the legal effect of the pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of national policy, and expressly renounced it. After signing the pact, any nation resorting to war as an instrument of national policy breaks the pact. On the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact. As Mr. Henry L. Stimson, then Secretary of State of

the United States, said in 1932:

> "'War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world ... an illegal thing. Hereafter, when engaged in armed conflict, either one or both of them must be termed violators of this general treaty law ... We denounce them as law breakers'."

(E) The Reaffirmation of Nuremberg Principles by the United Nations

The principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal, on motion of the United States government, were unanimously reaffirmed by the first session of the United Nations General Assembly.

(F) The International Military Tribunal for the Far East

The International Military Tribunal for the Far East, applied the same principles of international law in punishing the Japanese war leaders.

2. It is impossible to assume that Julius Rosenberg intended or had reason to believe at the time of the alleged conspiracy and when the overt acts were claimed to have been committed that an illegal advantage would be conferred on the Soviet Union without ascribing criminality to many persons holding preeminent civil positions whose views favoring the sharing of our atomic "secrets" with all nations including the Soviet Union were not colored by adherence to any of the tenets of communism. Among these leaders were:

(A) President Harry B. Truman
(See the President's Caruthersville address October 7, 1946, page 40-41 herein)

(B) Dr. J. R. Oppenheimer, Director of the Los Alamos Plant

Dr. J. R. Oppenheimer, Director of the Los Alamos plant, in testifying on December 5, 1945, before the United States Special Committee on Atomic Energy in the hearings on S. Res. 179, a resolution creating a special committee to investigate problems

relating to the Development, Use and Control of Atomic Energy opposed the policy of attempting to maintain secrecy. He testified as follows:

"Senator Byrd. Doctor, when you spoke of destroying the stock pile of bombs, would that mean, too, destroying the organization and the factories that made the bomb?

Dr. Oppenheimer. In the first place, I did not speak of destroying it; I was asked about it ...

.....

Dr. Oppenheimer. I would say this country should do, for the problem of atomic armament, what we expect other nations to do. If we expect them, and are convinced that they wish not to arm atomically, then I think that we should not arm atomically; and if we want to keep the plant some place, I think we should have that plant completely open and should allow the representatives of the powers with whom we are dealing to know as much about what we are doing as we would want to know about their plants

.....

The Chairman .....
Have you considered the possibility of a United Nations Organization ownership of such power plants as might be developed?

Dr. Oppenheimer. I think that would be a very good thing. I think that, for instance, if in China, where I understand we are prepared to help with the generation of power in the Yangtze Valley, it were possible and economically sound to establish atomic power, it would be a very good thing to do that through the United Nations Commission."

Hearings, Part 2, Dec. 5, 1945, p. 195, 197

(e) The Supreme Court in the Gorin case held that the sections of the Espionage Act here involved would be unconstitutional for indefiniteness, vagueness and generality if they "were" "simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to the national defense." The same reason forbids sustaining a verdict of a jury in a case like the one at bar when the jury was not given sufficient guidance to enable it

to determine whether the information, even if it related to the national defense of the United States, would be used to any advantage of a foreign nation that the Congress could under the Constitution prohibit.

Because of the inadequacy of the instruction of the Court concerning this issue, and indeed the inaccuracy and meagerness of the instruction that was given, its appeal rather to passion and prejudice than to reason, the jury were required to respond to the outside clamor from the press and other excitable elements of the nation to bring in a verdict which it is even today impossible to reconcile with the state of development of international law and the law of the land.

To sustain the verdict and uphold the fairness of trial would be to allow punishment merely for "bad faith" or political heterodoxy.

The meaning of "advantage" to a foreign nation that is not an injury to the United States, which is the basis of the death sentence pronounced on Julius and Ethel Rosenberg, has not yet been made definite by any decision or other rule of law that will save the statute from unconstitutionality on the grounds of vagueness.

Whatever cases, if any, may arise in the future under the corresponding language of the Atomic Energy Act, it is clear that under the circumstances of this case, assuming all the evidence adduced by the Government against them to be true, Julius and Ethel Rosenberg cannot be electrocuted with making an unconstitutional application of a statute which the Congress had repealed as regards this particular type of offenses, before the prosecution in this case began.

"In an imperfect system of criminal law the doctrine of criminal agreement for acts not criminal may be of great practical value for the punishment of acts which ought to be made punishable irrespective of agreement, and especially for some kinds of fraud, but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such powers ought to be carefully guarded since the legislature admits its own inability to discover the principles on which legislation ought to proceed." (Wright on Conspiracies, p. 68)

The United States has not yet reached the stage where the citizens are executed because they held out collection cans for the Spanish Anti-Fascist Refugees or because the accused, back in the depression days still vivid in the memories of many of us, while in college were members or affiliated with the Young Communist League!

VIII

The court in sentencing the Rosenbergs to death expressly based it on its own finding that they had handed the atom bomb to the Soviet Union. But, the defendants were not charged in the indictment with the offense of transmitting information. They were indicted only for conspiring to transmit information. As the offense of a conspiracy is a separate and distinct offense from the substantive offense which is the object of the conspiracy, the death sentence was pronounced against them by Judge Kaufman on his own finding, that they were guilty of an offense with which the government and the grand jury had not charged them. The sentence is therefore unauthorized and void. This is true even if the Espionage Act were the applicable statute.

Heretofore, the declarations of the court made on the occasion of pronouncing sentences on the defendants

have been quoted. There was no hesitancy on the part of the court in stating without any qualification his opinion that the defendants had put into the hands of the Russians the A-bomb." This, of course, was pure speculation and conjecture unsupported by any evidentiary basis, as President Truman after leaving office, out in Independence, Missouri, expressed the belief that the Russians do not yet have the A-bomb. But, even if the factual findings of the court were susceptible of proof and had been proven in the trial, it still would have been beyond the jurisdiction of the court to sentence a person to death on a finding by the court of guilt of commission of a crime for which the person was not tried or charged. It was a denial of due process of law, and a violation of that clause of the Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ..."

The court in instructing the jury before they retired to consider their verdict stated:

> "The defendants are accused of having conspired to commit espionage .....
> "..... the statute has made a conspiracy to commit a crime a distinct offense from the crime itself." (Tr. p. 1550)

After having correctly charged the jury that the defendants were accused only of a conspiracy to commit a crime and not the crime itself, in pronouncing sentence the court declared that the defendants had committed the crime itself and on this finding sentenced them to death.

It is hard to understand how the court could have fallen into an error so serious. The very same error was committed by the court at the commencement of the trial.

Counsel for the defendant, Mr. Sobell, called attention to the error and the court corrected it telling the jury that the defendants were charged not with the actual transmission of information but simply with a conspiracy to transmit information:

> "The Court ....
> The charge in this case, again, I tell you, is conspiracy to commit espionage, in that matters vital to the national defense were transmitted to Russia for the purpose of giving Russia an advantage.
> That is the charge ....."
> Mr. Phillips: May I respectfully draw the court's attention to the fact that the court has just told the jury that the charge is that information was transmitted. That is not the charge. Nowhere in the indictment is it stated that information actually was transmitted. The indictment charges that a plan was laid to transmit information.
> The Court: Very well, I accept that correction. The charge is that they conspired and they combined and they confederated and they agreed with each other and with intent and reason to believe that it would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the national defense of the United States."
> Printed Transcript, pp. 185-186

The case in a nutshell is this:

The Constitution provides that no person shall be held to answer for a capital crime unless on indictment of a Grand Jury.

The Grand Jury found an indictment charging the defendants with the crime of conspiring to transmit but not the crime of transmitting itself.

The Court instructed the trial jury that the defendants were charged only with the crime of conspiring and not the actual transmission.

The jury found the defendants "guilty as charged." (Tr. p. 1579)

The Court sentenced the defendants to death for the crime of actual transmission.

It necessarily follows that the sentence is void because the defendants could not be held to answer or sentence for a crime that they had not been charged with by the Grand Jury.

Justice Field who wrote the opinion of the Supreme Court in the case of In Re Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. ed. 149, declared:

> "When the jury have returned their verdict, the court has to pronounce the proper judgment upon such verdict--and the law in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed."
>
> . . . . . .
>
> The laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized."

IX

The court gave prejudicial instructions to the jury implying that the defendants had actually transmitted secret atomic information.

It is hardly necessary to repeat here that the defendants were not charged with actually transmitting information to the Soviet Union. The only charge in the indictment was that they conspired to commit that offense. Yet, twice during the instructions to the jury, the court in effect told them that the defendants were charged with the actual accomplishment of the objects of the alleged conspiracy. The court said:

> "Persons may be guilty of being parties to a conspiracy though the objects of the conspiracy were never accomplished. On the other hand,

> proof concerning the accomplishment of the objects of the conspiracy is the most persuasive evidence of the existence of the conspiracy itself. Simplifying this perhaps a bit more, success of the venture, if you believe it was successful, is the best proof of the venture or the agreement. (In this case the Government claims that the venture was successful as to the atom bomb secret.) The agreement is generally a matter of inference deduced from acts of the persons accused done in pursuance of an apparent criminal purpose." (Tr. pp. 1551-2)
>
> "Bear in mind--please listen to this, ladies and gentlemen--that the Government contends that the conspiracy was one to obtain not only atomic bomb information ....; that the atomic bomb information transmitted by the Rosenbergs was classified as top secret;" (Tr. p. 1567)

Thus, the court not only stated to the jury that the defendants were charged by the government with the transmission of the "atom bomb secret," but also stated as a fact that "atomic bomb information" had been transmitted by the Rosenbergs. On account of exactly the same error by the court, the Sixth Circuit Court of Appeals in Thomas v. United States, 151 F. 2d 183, reversed the judgment and remanded the case for a new trial.

It is submitted that a conviction and sentence based on such a palpably erroneous instruction violates the rights of the defendants under the Sixth Amendment to be informed of the nature and cause of the accusation. The Grand Jury found only that they conspired, but the court instructed the jury that they succeeded in accomplishing the object of the alleged conspiracy.

A question to be decided by the jury was whether or not the Rosenbergs had conspired to transmit any atomic bomb information. The government claimed that they had so conspired. The Rosenbergs denied that they had conspired. The government did not contend that they had actually transmitted atomic bomb information.

The court's instructions assumed that atomic bomb information had been transmitted by the Rosenbergs. It will be noted that the court did not say that the government contended that the atomic bomb information which it contended the Rosenbergs conspired to transmit was classified as top secret.

This was exactly the same error that the court committed at the beginning of the trial when it said:

> "The charge in this case, I tell you, is conspiracy to commit espionage, in that matters vital to the national defense were transmitted to Russia for the purpose of giving Russia an advantage."
> That is the charge .....

On attention being called to the erroneous statement that the charge was that information was transmitted, the court corrected the statement.

Yet the same error was repeated in the final instructions to the jury and was not corrected. It was bound to have been prejudicial to the defendants. It shows a biased state of mind on the part of the court--the persistence in stating to the jury that the defendants were charged with transmitting information to Russia and had transmitted information to Russia. It is impossible to consider that a trial so conducted by a judge making so many errors against the defendants was a fair trial. This was not due process of law.

Mr. Justice Field who wrote the opinion of the Supreme Court in the Second National Bank of Leavenworth v. Hunt, 78 U.S. 391, 20 L. ed. 190, declared the law as follows:

> "Courts cannot assume in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the exclusive and appropriate province of juries."

The defendants were denied a fair trial because the judge and jury before whom the case was tried, were not impartial but biased in favor of the Government and against the accused as shown by the voir dire examination of the prospective jurors herein set out:

> "The Court: Very well.
> Does any juror have any prejudice against the atomic bomb or information relating thereto, or object to the method employed by the government in handling information concerning the atom bomb?
>
> (Prospective jurors indicate in the negative.)
>
> The Court: Does any juror oppose the use of atomic weapons in time of war or oppose the Government's continued research and development of atomic weapons, and the supervision of atomic energy and information relating thereto?
>
> (Prospective jurors indicate in the negative.)
>
> The Court: Does any juror feel that developments and information concerning atomic energy should be revealed to Russia or any Russian satellite country?
>
> (Prospective jurors indicate in the negative.)
>
> The Court: Does any juror favor the platform urged by Russia - the United Nations regarding the use and development and supervision of atomic energy?"
>
> (Prospective jurors indicate in the negative.)
>
> (Tr. p. 59)

The disqualification of the trial judge, Irving R. Kaufman, to preside at the trial of a case involving the issues presented in the case at bar arises from

(1) His belief in brute force exerted in the barbaric and uncivilized bombing of innocent women and children;

(2) His lack of a proper conception of international

law by which such practices even before World War II and the organization of the United Nations had been interdicted;

(3) His disbelief in the sanctity of international treaties and solemn pledges by which the United States prior to the development and use of atomic bombs renounced force and the threat of force in international relations.

The jury were under the same disqualification as the judge. Their answers to his questions revealed that they each and all shared Judge Kaufman's bias and incompetency.

XI

The defendants were denied a fair trial because the trial judge, Irving R. Kaufman, when the sentence of death was pronounced on the defendants, was ignorant of the fact that Congress in adopting the Atomic Energy Act of 1946 re-examined the penal provisions of the espionage statute and had deprived the courts of the power to impose the death sentence for any violation of the provisions enacted for the control of the dissemination of information concerning atomic bombs except on recommendation of the jury and then only in cases where the violation was with intent to injure the United States. (See statement quoted p. 17 above)

XII

The indictment was not found within three years next after the date of the last overt act alleged in the indictment and the statute of limitations prescribed by Sec. 3282, Title 18 U.S.C. therefore bars any further punishment of the defendants. Sec. Sec. 3283 provides as follows:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

XIII.

On June 13, 1953, relator, through his counsel, made application to the Honorable Irving R. Kaufman, the District Judge who tried the case, in his chambers, for the writ of habeas corpus. The petition submitted to Judge Kaufman was practically identical with this petition. Judge Kaufman took the petition under advisement, and on June 15, 1953, denied the application leaving in the office of the Clerk a memorandum assigning as the ground for the denial that relator was an intruder and an interloper, and had no right to make application on behalf of Julius and Ethel Rosenberg, they being represented by counsel, the said E. H. Bloch, who had sent a telegram to Judge Kaufman opposing relator's application. Inasmuch as relator did not file his petition with the Clerk of the District Court, nor pay the filing fee required by statute in such cases, he is advised that his right to invoke the power of Your Honor as a Circuit Judge, granted by Section 2241, Title 28 U. S. C., does not depend on his filing a notice of appeal in the District Court as provided by the Federal Rules of Civil Procedure.

XVI.

WHEREFORE, relator prays:

1. That a writ of habeas corpus be issued by Your Honor forthwith directed to the defendants named in the caption, commanding them to produce the bodies of Julius and Ethel Rosenberg before Your Honor at a time specified, then and there to receive and do what Your Honor shall order, concerning the detention

and restraint of the said Julius and Ethel Rosenberg, and that they be ordered discharged from the aforesaid imprisonment; or in the alternative that it be ordered that this petition be made a part of the record in the District Court for further proceedings in that Court, in accordance with Your Honor's order as provided by Section 2241, Title 28 U. S. C.

2. That the order heretofore entered directing the execution of the defendants Julius and Ethel Rosenberg be stayed pending the hearing and judgment on this petition;

3. That all such further writs and processes issue agreeable to the customs and usages of law in such cases as may be necessary for the full protection of Julius and Ethel Rosenberg against any deprivation of liberty or life not in accordance with due process of law.

IRWIN EDELMAN, as next friend
of Julius and Ethel Rosenberg

By FYKE FARMER

Joseph C. Thomson

JOSEPH C. THOMSON
217 Broadway
New York, New York

Fyke Farmer

FYKE FARMER
Nashville, Tennessee
Of Counsel

Daniel G. Marshall

DANIEL G. MARSHALL
Los Angeles, California
Of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

FYKE FARMER, makes oath, as follows:

1. That he is a duly licensed attorney, a member of the bar of the State of Tennessee in good standing, residing at Nashville, and a member of the bar of the Supreme Court of the United States;

2. That his interest in the Rosenberg case was first sharply aroused by reading a pamphlet written by the relator, Irwin Edelman, entitled "Freedom's Electrocution", in which various errors prejudicial to the defendants and particularly the suppression of the testimony and exclusion of the public from the court room were pointed out;

3. That he was shocked by the denial of clemency by President Eisenhower and thereupon undertook to read the record and make a study of the case in an attempt to discover errors on which the release of the defendants from the sentence of death might be procured;

4. That upon discovery of the points set out in the forepart of the petition, affiant communicated his findings with a memorandum brief to Mr. E. H. Bloch, counsel for the defendants, and since March 1, 1953, has made diligent efforts to persuade the said Bloch to bring the errors to the attention of the court by appropriate pleadings. Despite these attempts the said Bloch has not seen fit to ask for the release of Julius and Ethel Rosenberg on the grounds other than one going to the insufficiency of the indictment to charge that an offense for which the court was authorized to pronounce the death penalty;

5. Affiant commenced the preparation of this petition immediately following the hearing on June 1, 1953, but

was forced to return to his home in Nashville, because of an urgent personal matter and was not able to return to New York to complete the petition until the afternoon of June 11th. He had intended presenting this petition to the said Bloch and asking him to file it as the counsel of record of Julius and Ethel Rosenberg, but was informed on June 12th, as the petition was nearing completion, that the said Bloch is out of the city in Washington, D.C. Because of the shortness of time and the extreme urgency of the situation, affiant has therefore presented the petition to the court without it having been examined by the said Bloch;

6. Affiant avers that he is acting in this matter in behalf of and with the full authority and consent of the relator, Irwin Edelman, whose interest that entitles him to maintain it is that of a humanitarian and the desire to prevent a terrible injustice to a man and wife and the parents of two children of tender ages whom he considers to be innocent of the crime for which they are about to suffer the penalty of death. Further, the said relator is motivated by a sense of duty as a citizen of the United States to assist in preserving the nation's traditions for justice under law;

7. Affiant hereby states that this petition is presented in sincerity and truth for the reasons stated and no other, and that he verily believes that Julius and Ethel Rosenberg are entitled to the relief hereby sought for them.

Irwin Edelman

Sworn to before me this
16th day of June, 1953.

Robert B. Waggaman

Notary Public, D.C.
My commission expires May 1, 1955

File No.

SUPREME COURT. U. S.

~~*October Term, 19 53*~~

Term No. ----

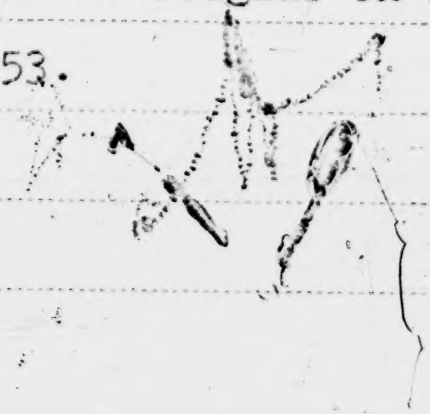
United States, on relation of Edelman,

Petitioner,

vs.

Carroll, William A., etc., et al.

Petition for writ of habeas corpus presented to Mr. Justice Douglas on June 16, 1953.



Filed ..... *19* ....

U. S. GOVERNMENT PRINTING OFFICE 16—17577-8

For Justice William O Douglas

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF

NEW YORK

United States of America, On the Relation of Irwin Edelman

PETITIONER

vs.

William A. Carroll, United States Marshall for the Southern District of New York, and Wilfred L. Denno, Warden of Sing Sing Prison of the State of New York, Ossining, New York,

RESPONDENTS

MEMORANDUM BRIEF ON BEHALF OF PETITIONER

I.

The deprivation of effective assistance of counsel may be grounds for an application for a writ of habeas corpus.

United States of America vs. Hayman, 342 U. S. 205, 72 S. Ct. 263, 96 L. ed. 232.

II.

The District Court has statutory authority to issue ... all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U. S. C. Su. 1651(a).

III.

"The practice of a next friend applying for a writ is ancient and fully accepted."

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United States ex. rel. Bryant vs. Houston Sec. of the Treas. (2nd C.C.A) 273 F 915.

IV.

"I know, too, that it has been the reproach of the English Courts, that they have too sternly exacted proof, that the application was authorized by the aggrieved party, before permitting the writ to issue. But, as yet, the courts of the United States have, I think, avoided this error. The writ issues here, as it did in Rome, whenever it is shown by affidavit that its beneficent agency is needed. It would lose its best efficiency if it could not issue without a petition from the party himself, or some one whom he had delegated to represent him. His very presence in court to demand the writ would, in somesort, negative the restraint which his petition must allege. In the most urgent cases, those on which delay would be disastrous, forcible abduction, secret imprisonment, and the like, the very grievance under which he is suffering, precludes the possibility of his applying in person or constituting a representative. The American books are full of cases, -- they are within the experience of every practitioner at the bar, -- in which the writ has issued at the instance of third persons, who had no other interest or right in the matter than what every man concedes to sympathy with the oppressed."

Kane, District Judge, in United States ex. rel. Wheeler vs. Williams, (1855) 28 Fed. Cas. 16, 726 4 Am. Law Reg. 5, 5 Pa. Law J. R. 377.

"... in many cases the writ has issued on the application of a stranger or volunteer ...".

29 Corpus Juris. Habeas Corpus, Sec. 151, p. 139.

Respectfully submitted,

Fyke Farmer

Fyke Farmer

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF

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United States of America, On the Relation of Irwin Edelman

PETITIONER

vs.

William A. Carroll, United States Marshall for the Southern District of New York, and Wilfred L. Denno, Warden of Sing Sing Prison of the State of New York, Ossining, New York,

RESPONDENTS

SUPPLEMENTAL MEMORANDUM CONCERNING RIGHT OF IRWIN EDELMAN TO APPLY FOR HABEAS CORPUS

Since the submission of Mr. Edelman's petition to the Court on June 13th, counsel of record for the defendants, Julius and Ethel Rosenberg have obdurately continued in the refusal to raise the adequate and available grounds for the release of the defendants by habeas corpus (See attached copies of telegrams.) By reason of this fact, the duty of the Court to see that the constitutional rights of the accused are either protected or intelligently and understandingly waived by the accused themselves after their having been fully informed of their rights has become clearer than it was before.

On May 29, 1953, Mr. Daniel G. Marshall of Los Angeles, co-counsel with the undersigned for the applicant, Mr. Edelman, wrote an exposition concerning the legal basis for Mr. Edelman's contemplated application on behalf of the Rosenbergs. This letter sets forth so lucidly and forcefully the justification for outside intervention on behalf of the Rosenbergs, that it is copied for the Court's consideration. The letter is as follows:

Daniel G. Marshall
Attorney at Law
Los Angeles, California

"Mr. Fyke Farmer
Attorney at Law
Bellevue Drive
Nashville 5, Tenn.

Dear Mr. Farmer:

Supplementing my other letter of this date replying to your letter of May 27th I have now had some opportunity to consider further the question of the right of Mr. Edelman to make the application on behalf of the Rosenbergs. I have read the Houston and Hayman cases cited in your letter.

In the Hayman case the person for whom the writ was intended was himself the petitioner. The substantive point, it seems to me, is that there was a deprivation of the effective assistance of counsel, contrary to the Sixth Amendment and an impairment of the due process clause. (127 F. (2d) 456, 460, 461). It is of interest to note that at page 461 the opinion says that a failure to see that the constitutional rights of the accused were either protected or intelligently waived is chargeable to the court. In the Houston case it was held that a next friend did not have sufficient interest to apply for a writ of habeas corpus because the application for the writ did not set forth some reason or explanation satisfactory to the court showing why the detained person did not sign and verify the complaint and who "the next friend" was, since it was not intended that the writ should be availed of, as a matter of course, by intruders or

uninvited meddlers styling themselves next friends.

On the other hand, this case approvingly quotes the Ferrens case which says that "it has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention."

Since the Rosenbergs are represented by counsel of record who continue an active, but ineffective, representation of them, the requirement of the Houston case, it seems to me, might be met by allegations on the following subjects:

a) That there is not and has not been effective assistance of counsel.

(1) The Court has said their counsel erred in failing (a) to object to the Elitcher hearsay testimony (195 F. 2d 596); (b) to move for a mistrial (200 F. 2d 665); (c) to move for a change of venue or for a continuance. (other instances where the Court of Appeals has branded other acts of their counsel as mistakes may exist). The statement of that court (195 F.(2d) 596, footnote 9) that they were astute, conscientious and able and of Judge Ryan that the defense was conducted intelligently by able counsel is rebuttable, e.g., after Judge Ryan so appraises them he then speaks of their significant failure to either move for a change of venue or for a continuance.

2) Their errors, principally the ones dealt with by you in point B. p. 4. of your May 24th letter to Mr. Bloch, which since not raised on appeal were not evaluated in the Court of Appeals.

3) Their failure to urge at any stage the points raised by you.

The Rosenbergs cannot be held to have intelligently waived, by relying on Mr. Bloch's judgment (no matter what his difficulties were, and they were many, and no matter how pure his intentions are and were for them) their constitutional rights.

4) The impairment of the effective assistance of counsel is chargeable to the Court;

5) The court itself must, of course, act to prevent injustice. Sua sponte on innumerable occasions courts have raised constitutional objections to penal statutes (see Hayman, 96 L. ed. p. 236, where a majority did so).

6) Important and sacred as the right of the accused is to select his own counsel and to elect to be bound by his mistakes in nearly all cases, this rule yields to the paramount requirement of justice, evidenced where a court of its own motion raises defenses.

7) The demands of fairness, integrity and public reputation of judicial proceedings (195 F. 2d 596, footnote 9) prevail over the obduracy (intentional or unintentional) of the accused who refuses to raise adequate and available defenses known to him. An accused will not be allowed stubbornly to accept a greater penalty than the law imposes once the court is made aware of the correct situation.

8) The Rosenbergs, cut off from the world, except through their counsel who is either not able or obdurate, are impossible of access, within the meaning of the Ferrens case, to offer them the petition for habeas corpus for their signatures for ethical reasons by other counsel or by a "next friend" in person because they are so confined.

9) It must be presumed that the Rosenbergs desire to have their lives spared (petition for clemency, appeals, etc.) and that if offered rescue by habeas corpus of a "next friend" they would accept.

10) There can be said to be no intelligent refusal by them of this offer unless the court itself is satisfied that they know of the offer and reject it but even then I can conceiveof no reason which the court would accept as adequate for denying the court the opportunity to pass upon the vital propositions raised by you.

11) The circumstances which attracted your interest in the case and your duty as an officer of the court to prevent injustice - and your efforts to persuade Mr. Bloch to raise these points would lend support to the right of Edelman to press his petition.

(Signed) Daniel G. Marshall

Respectfully yours

C O P Y

1953 Jun. 14 AM 9 22

Mr. Emanuel H. Bloch
Hotel Statler
Washington, D. C.

Last night I sent you air mail special delivery a copy of Mr. Edelman's petition for habeas corpus submitted by me yesterday to Judge Kaufman with a request that you as counsel for Julius and Ethel Rosenberg adopt the petition Monday morning so as to obviate any question of Edelman's standing to seek habeas corpus. I call your attention to today's New York Times, page 30, stating that Mr. Silverman said Judge Kaufman would decide today whether Mr. Edelman had any standing in court. I have decided to present order for the writ of habeas corpus today to Judge Kaufman directing that Julius and Ethel Rosenberg be brought before the court Monday July 13 10 A. M. or at such later date as may be fixed by the court. Therefore I appeal to you as counsel for Julius and Ethel Rosenberg to advise Judge Kaufman by telegram addressed to his home 1185 Park Avenue that Julius and Ethel Rosenberg adopt the petition and join in the prayer of relief by habeas corpus. Kindly advise me-Hotel Tudor by sending copy of your telegram to Judge Kaufman.

(Signed) Fyke Farmer

NA120 PD=TDB Washington DC 14 1157A
Fyke Farmer=
Hotel Tudor=

In re Rosenberg. Received telegram from Fyke Farmer re his petition behalf Edelman suggest you procure contents from farmer we have no knowledge of contents of farmers petition stop we do not sponsor it as he requests stop petition filed without our knowledge or consent or that of our clients stop Farmers petition will of course have to be judged on its own merits=
Emanuel H Bloch John F. Finerty Malcolm Sharp

NA168 PD=Washington DC 14 23 F
Fyke Farmer=
Hotel Tudor=
Portion farmers papers received. Our position unchanged=
Emanuel H Bloch John F. Finerty Malcolm Sharp

RECEIVED
JUN 16 1953
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court
of the United States

U.S.A, ex rel Edelman
vs
Carrill, etc. et al

I

Violation of the constitutional right to public trial necessarily implies prejudice,

Peo v. Byrnes 84 C.A.(2) 190 P(2) 290 (1948), approving quoting Davis v. U.S. 247 F. 394, 398 and Tanksley v. U.S. 145 F.(2) 58

VI

a Stark Chancery Real

Can only produce A void

Judgment

Respectfully Submitted

Myles Lasner

Counsel for Petitioner

Received copy at 2:20 P.m. 6/10/13

~~Counsel for Petitioner~~ Robert S Endell

~~Dept of Public~~ Atty

Dept of public

5

(Bon, pose dess)

Historical and revision notes "words "or by someone acting in his behalf" was added. This following the actual practice of the courts, as set forth in United States ex rel. Kumaro v. Watkins, CCA 1908, 164 F 152; Collins v Traeger, CCA 1928, 27 F 2d 842 and cases cited"

Received, 2:35 p.m. 6/16/53
Robert L. Riddell
Atty
Dept of Justice

SUPREME COURT OF THE UNITED STATES

JULIUS ROSENBERG and ETHEL ROSENBERG,

Petitioners,

vs. CASE NO. _____

THE UNITED STATES OF AMERICA

I

The power and jurisdiction of Mr. Justice Douglas to make the order staying the electrocution of the Rosenbergs is conceded by the Solicitor General.

II

The Supreme Court has the power to affirm, modify, vacate, set aside or reverse an order only when it has been lawfully brought before it for review.

28 U.S.C.A. 2106

III

The Appellate jurisdiction in the Federal System of Procedure is purely statutory.

Hacke v. U.S. 217 U.S. 423, 30 S.Ct. 539

IV

The government must place the finger of the Court on a statute which specifically or by fair intendment names an order of a single justice as being subject to Review by the Court.

This the government has not done and cannot do and hence the Court cannot look to 28 U.S.C.A. 2106 for the reason that this order has not and cannot be "lawfully brought before the Court for Review."

V

The vague claims of the Attorney General in his brief

that the Court has jurisdiction is not supported by the only three cases he cites, i.e.,

(1) Chetwood, 165 U.S. 443-dealth with certiorari to correct excesses of jurisdiction;

(2) Ex parte U.S. 287 U.S. 241-dealt with the power of this Court to mandate a district court;

(3) U. S. etc. vs. U.S. 325 U.S. 196 dealt with the power of this Court to aid its exclusive appellate jurisdiction by a common law writ.

VI

That the Court does not have the power to touch the Douglas order is not as novel as the government asserts.

Over a century ago the Court said it could not exercise any power "in an Appellate form over decisions made at Chambers by a justice of this (Supreme) Court or a judge of the District Court." (In the matter of Metzger 46 U.S. 176; 5 How.).

The decision there made was a denial of habeas corpus.

VII

The cases cited by the Attorney General (Brief, P.6, did not deal with the question here raised by defendants. In those cases it was assumed that the power existed and the point was never examined.

Respectfully submitted,

FIKE FARMER and DANIEL G. MARSHALL

BY-- Daniel G. Marshall

Attorneys for Petitioner Edelman

File No.

SUPREME COURT, U. S.

SPECIAL TERM, June 18 & 19, 1953

~~October Term, 19~~

Term No. ----

Rosenberg, Julius et al.,

Petitioners,

vs.

United States

Memorandum submitted by Mr. Daniel G. Marshall.

Filed June 19, 1953

U. S. GOVERNMENT PRINTING OFFICE 16—17577-3

June

- - - - - - - - - - - - - -

UNITED STATES

vs.

ROSENBERG

- - - - - - - - - - - - - -

MEMORANDUM SUBMITTED BY FYKE FARMER ON THE QUESTION OF THE POWER OF THE COURT TO VACATE JUSTICE DOUGLAS' STAY

The power of the Court to vacate the stay issued by a single Justice in pursuance to his statutory authority with respect to applications for the writ of habeas corpus is far from clear. Section 2241(b), Title 28 U.S.C. grants specific authority to any Justice either to grant the writ or to decline to entertain the application and "transfer the application for hearing and determination to the district court having jurisdiction to entertain it". This is in effect what Justice Douglas did.

The authority to stay the execution of the death sentence was necessarily implied from the unquestioned authority as a Justice of the Court to direct that the determination of the application be in the District Court. Otherwise his order would be rendered moot by the execution. The stay was essential to the preservation of jurisdiction.

Heretofore, it has been considered that the jurisdiction of the Supreme Court is either original or appellate. The power to vacate an order of a Justice deriving from his statutory grant of powers with respect to applications for the writ of

habeas corpus is not within the original powers vested in the Supreme Court by the Constitution. There appears to be no statute conferring upon the Court appellate or supervisory jurisdiction over one of the Justices in the case of his exercise of statutory jurisdiction and powers on applications for the writ of habeas corpus. Sections 2106 and 1651, Title 28 U.S.C. relied on by the Solicitor General are not applicable here.

There is no question of a failure of this Court to exercise the judicial powers. The question relates to the manner of the exercise. Its powers of review in this case will arise on application for certiorari after determination of the issues in the Courts below and in conformity with the Rules heretofore promulgated.

Respectfully submitted,

Fyke Farmer

Fyke Farmer

Receipt of a copy of the within memorandum acknowledged this 19th day of June, 1953, 10:13 A.M. Robert L. Stern

ROBERT L. STERN
ACTING SOLICITOR GENERAL

File No.

SUPREME COURT, U. S.

SPECIAL TERM, June 18 & 19, 1953

~~October Term, 19~~

Term No. ---

Rosenberg, Julius et al.,

Petitioners,

vs.

United States

Memorandum submitted by Mr. Fyke Farmer.

Filed June 19, 1953

U. S. GOVERNMENT PRINTING OFFICE 16 17577 1

File No.

SUPREME COURT. U. S.

SPECIAL TERM June 18-19

~~October Term~~, *19* 53

Term No.

Rosenberg, et al,

Petitioners,

vs.

United States

Motion for stay of execution.

Filed June 19, *19* 53.

Supreme Court of the
United States

Julius Rosenberg and
Ethel Rosenberg,

Petitioners

v.

United States of America,

The petitioners, Julius Rosenberg and Ethel Rosenberg, by Emanuel H. Bloch, their attorney move this Court for a stay of the execution of the petitioners, now scheduled for June 19, 1953 at 11 P. M. (which is about 18 1/2 hours from the time of this Court's decision vacating the stay order of Mr. Justice Douglas heretofore granted, on June 17, 1953) pending the determination by the President of the United of your application of the petitioners for executive clemency for the reasons set forth in the oral arguments before this Court this day.

Dated
June 19-1953

Respectfully submitted,

Emanuel H. Bloch,
attorney for petitioners

File No.

SUPREME COURT. U. S.

SPECIAL TERM June 18-19

~~October Term~~, *19* 53

Term No.

Rosenberg, et al.,

Petitioners,

vs.

United States

Motion to reconsider.

Filed June 19 , *19* 53.

— TO U.S. Supreme Court

U.S.

v.

Rosenberg

We hereby move this court to reconsider the question of its power to vacate Justice Douglas stay orders and to hear oral argument thereon, immediately and before the adjournment of the special term of court.

6/19/53

Isyke Tasman

attorney for

Irwin Edelman

Abner W. Sibal